Supreme Court, U.S.
FILED

No. 09- 09-398 SEP 30 2009

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IN THE

Supreme Court of the United States

THE STATE OF LOUISIANA,

Petitioner,

v.

DONALD W. ABSHIRE, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the filing of an amended petition converting an ordinary action to a class action after the effective date of the Class Action Fairness Act of 2005 ("CAFA") constitutes the commencement of an action under CAFA for purposes of removal when the amended petition adds a new claim for statutory attorney's fees subjecting defendants to a significant increase in exposure.

2. Whether state law "relation-back" tests should be used by Federal Courts to determine "commencement" of an action under CAFA, thereby creating disparate results in issues of Federal jurisdiction.

LIST OF PARTIES

Petitioner:

The State of Louisiana, through the Department of Insurance, the Office of Financial Institutions and the Office of Risk Management

Respondents:

See Appendix E

CORPORATE DISCLOSURE STATEMENT

The State of Louisiana is a sovereign state of the United States of America.

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OPINIONS BELOW

The opinions of the United States Fifth Circuit Court of Appeals (App. A) and the United States District Court for the Middle District of Louisiana (App. B, C) are reported as follows:

Admiral Ins. Co. v. Abshire, et al., 574 F.3d 267 (5th Cir. 2009).

Abshire v. State of Louisiana, 2009 WL 50178 (M.D. La. 2009).

JURISDICTION

The judgment of the United States Fifth Circuit Court of Appeals was entered on July 2, 2009. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND POLICIES AT ISSUE

The following statutory provisions are reproduced in the Appendix: Class Action Fairness Act of 2005, *Pub. L. No. 109-2, § 2, 119 Stat. 4-5*; (section 9 only) 28 U.S.C. § 1332; 28 U.S.C. § 1441; 28 U.S.C. § 1446; 28 U.S.C. § 1453; and Louisiana Code of Civil Procedure article 595 (App. D).

STATEMENT OF THE CASE

Respondents, Abshire, *et al.*, purchased various investment products in the form of corporate notes, insurance policies, and annuities from three Louisiana

companies: Public Investors, Inc.; Public Investors Life Insurance Company; and Midwest Life Insurance Company. After the companies failed in 1991, Respondents filed an ordinary delictual action in state court alleging that the negligent, intentional and criminal acts of Louisiana state regulators caused the failure of these companies and, ultimately, the loss of the Respondents' investments. Petitioner, the State of Louisiana, regulated these companies through two of its state agencies: The Office of Financial Institutions and the Department of Insurance.

In the ensuing years after the filing of the original complaint, Respondents amended their complaint eight times. The original complaint alleged negligence. Although subsequent amendments allege intentional misconduct and criminal activity on the part of state regulators, the original and all eight amended complaints sounded in tort and were brought on behalf of the Respondents as individually cumulated actions.

In April 2007, counsel for the Respondents filed a motion to withdraw as counsel for 243 Respondents with whom their attorneys had lost communication. The state trial judge denied the motion and thus left intact a previously scheduled trial on the merits set to begin September, 2007.

Based on their claim that they lacked the ability to communicate with their clients in order to conduct possible settlement discussions or prepare for trial, Respondents' counsel suggested conversion of this case to a class action. In August 2007, the state district judge *sua sponte* ordered the trial continued so that

Respondents could seek to amend their complaint – for the ninth time – to seek class certification.

In May 2008, Respondents filed a ninth amended complaint in order to convert this case from individually consolidated actions, brought on behalf of each named Respondent, into a class action.

Significantly, Respondents included a claim for recovery of the "costs of suit, including reasonable attorneys' fees *as provided by law*" in the list of recoverable damages in the ninth complaint (Emphasis added). The ninth complaint was the first time in the history of this litigation that (1)Respondents included attorneys' fees as an element of recoverable damages[1]; and (2) Respondents were *entitled as a matter of Louisiana law* to recover attorneys' fees and costs.

Based upon this fundamental change in the nature of this case, and pursuant to the Class Action Fairness Act ("CAFA")[2], Petitioner timely removed this case. Petitioner asserted that minimal diversity jurisdiction under CAFA existed, along with the requisite $5,000,000 aggregate jurisdictional amount. Respondents filed a Motion to Remand and Assess Costs and Fees, which Petitioner opposed.

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[1] Although Respondents "prayed" for attorneys' fees in the "prayer" paragraph of each complaint, this prayer was meaningless because attorneys' fees are not recoverable by plaintiffs in an ordinary delictual action. *See* argument in Reasons for Allowance of the Writ.

[2] Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 2, 119 Stat. 4-5; 28 U.S.C. 1453.

The United States District Court for the Middle District of Louisiana approved the Magistrate Judge's Report and Recommendation, which granted the Respondents' Motion to Remand and denied their Motion to Assess Costs and Fees.[3] Petitioner timely appealed that ruling to the United States Fifth Circuit Court of Appeals, which affirmed the District Court's ruling.[4]

REASONS FOR GRANTING THE PETITION

> **"An enormous amount of expensive legal ability will be used up on jurisdictional issues when it could be much better spent upon elucidating the merits of cases . . . a trial judge ought to be able to tell easily and fast what belongs in his court and what has no business there."[5]**

The employment of state law relation-back tests to determine when a civil action was "commenced" for CAFA[6] removal purposes has caused confusion in district and appellate courts, causing them to steer away from simple Federal jurisdictional principles.

In the case at bar, Respondents' new claim for statutory attorneys' fees made the ninth amended

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[3] Appendix B.

[4] Appendix A.

[5] *Sisson v. Ruby*, 497 U.S. 358, 375 (1990).

[6] CAFA Pub.Law. 109-2 ¶9 ("the amendments made by this Act shall apply to any civil action commenced on or after the date of enactment of this Act.")

complaint a civil action which "commenced" after the effective date of CAFA. The jurisdictional removal inquiry by the court should end there. However, the Fifth Circuit employed a state law relation-back test to hold that the statutory attorneys' fee claim was not a new claim which would trigger CAFA jurisdiction.[7]

The Fifth Circuit remanded this case based on a relation-back test even though in the same opinion it flatly rejected the relation-back test employed by the Seventh[8], Eighth[9] and Tenth[10] Circuits. The court erred both in its use of a relation-back test and in concluding that Respondents' claim for statutory attorneys' fees on behalf of the class representatives is not a new claim which commences a civil action after the effective date of CAFA. The Respondents' claim for statutory attorneys' fees is a new claim which triggers CAFA jurisdiction whether a "relation-back" test is used or not.

NEW ATTORNEYS' FEE CLAIM CANNOT "RELATE-BACK" TO ACTS OF REGULATORS

The Fifth Circuit simply concluded that the Respondents' claim for attorneys' fees arises out of the

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[7] *Admiral v. State of Louisiana*, 574 F.3d 267 (5th Cir. 2009).

[8] *Knudsen v. Liberty Mut. Ins. Co.*, 411 F.3d 805 (7th Cir. 2005).

[9] *Plubell v. Merck & Co.*, 434 F. 3d 1070 (8th Cir. 2006).

[10] *Prime Care of NE Kansas v. Humana Ins. Co.*, 447 F.3d 1284 (10th Cir. 2006).

same transaction and occurrence that led to the filing of the original complaint. Therefore it relates back and does not commence a new civil action for purposes of CAFA:[11]

> Regardless whether Louisiana itself or a common fund might be on the hook for Abshire *et al.'s* fees at some future point, and regardless whether Louisiana could have been liable for attorneys' fees under state law before Abshire *et al.* sought class certification, Louisiana has invited our attention to no authority that holds a request for attorneys' fees does not relate- back to an original filing.[12]

The court then applied a state relation-back test in holding that attorneys' fees "obviously arise out of the same transaction and occurrence that led to the filing of the original complaint."[13]

The Fifth Circuit employed a relation-back test despite the fact that within the same opinion the Court states that "the relation-back approach to commencement that other circuits employ, to the extent that it is ever analytically relevant, is particularly unilluminating in this case."[14] The court goes on to state that "relation-back and non-retroactivity might overlap, but, given their logical independence, it is far from

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[11] *Id.*

[12] *Admiral*, 574 F.3d at 278.

[13] *Id.*

[14] *Id.* at 276.

pellucid why the relation-back test should control our analysis of CAFA's non-retroactivity provision."[15] Yet, relation-back is exactly the test that the Court employed to determine whether the attorneys' fee claim was a new claim which would trigger CAFA.

ATTORNEYS' FEE CLAIM IS A NEW CLAIM THAT TRIGGERS CAFA JURISDICTION

The court erred in its relation-back analysis because attorneys' fees were not available under Louisiana law to Respondents when their case consisted of an ordinary delictual action.[16] Attorneys' fees cannot arise out of the tortious conduct of the Petitioner because courts in Louisiana are not empowered to make such an award in an ordinary tort-based law suit.[17]

However, once a class action is certified, Louisiana law gives courts the power to award attorneys' fees and costs by statute.[18] Therefore, attorneys' fees cannot relate-back to the actions or inactions of the Petitioner because such fees were unrecoverable at the time of the filing of the original petition. Now that Respondents are

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[15] *Id.* at 277.

[16] *Reymond v. City of Baton Rouge*, 82 So. 2d 75, 78 (La. 1918) (Attorney's fees cannot be allowed in an ordinary suit.); See also, *Hernandez v. Harson*, 237 La. 389, 408-409, 111 So.2d 320, 327 (La. 1959) (It is well recognized in the jurisprudence of this Court that as a general rule attorney's fees are not allowed except where authorized by statute or contract.)

[17] *Id.*

[18] La. C. Civ. P. art. 595.

attempting to convert this litigation into a class action, attorneys' fees are available by statute.

When Respondents amended their complaint to assert a class action, they specifically listed attorneys' fees "as provided by law" as an element of damages because their right to statutory attorneys fees under Louisiana law accrued upon conversion from an ordinary action to a class action. When attorneys' fees were pleaded in the ninth amended complaint, Respondents brought a wholly new claim which was previously unavailable, thereby commencing a new civil action for purposes of CAFA.

In *Grant v. Chevron Phillips Chemical Co.*[19], the Fifth Circuit addressed the issue of whether class action statutory attorneys' fees provided by Louisiana Code of Civil Procedure article 595 could be included with damages in the calculation of the amount in controversy for diversity jurisdiction purposes. The court stated:

> As noted, there is no provision of Louisiana law that allows, much less commands, the court to impose an award of attorney's fees on the defendant who cast in judgment in an individual (*non*-class action) tort case. So, if this were an individual tort action rather than a class action, the determination of the amount in controversy for purposes of removal and remand could not include attorney's fees.[20]

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[19] 309 F. 3d 664 (5th Cir. 2002)

[20] *Id.* at 871

Conversely, the court held that in a class action statutory attorneys' fees can be included in the amount in controversy calculation for diversity purposes. If Louisiana statutory attorneys' fees under article 595 can be used for calculation of the amount in controversy, then it stands that such fees must be considered a new claim which would open a removal window for purposes of CAFA jurisdiction.

In addressing whether attorneys' fees awarded under article 595 increase the defendant's exposure, the court in *Grant* went on to state:

> We next note that the plain wording of art. 595(A) does not literally limit the permissible sources available for attorney's fees. Facially, the code article does not restrict the source of such court-allowed fees to the fund or other recovery for the benefit of the class; the article requires only that such benefit result from the class litigation. *Neither does the article either expressly authorize or expressly prohibit the court's tagging the defendant with such fees.*[21] [emphasis added]

In *Knudsen v. Liberty Mut. Ins. Co.*, 435 F.3d 755, 758 (7th Cir. 2006) ("*Knudsen II*"), the defendants removed under CAFA after the plaintiffs amended their complaint to add a new claim which exponentially increased defendants' exposure. The court in *Knudsen II* ultimately held that, "a novel claim tacked on to an existing case commences new litigation for purposes of the Class Action Fairness Act . . . the addition

of new claims after February 18 [2005] means that litigation has commenced within the Act's coverage period."[22]

As in *Knudsen II*, Respondents added a new claim for attorneys' fees to their ninth amended complaint which was filed post-CAFA. The increase in exposure attendant to a claim for Respondents' attorneys' fees after almost 20 years of litigation needs no further elaboration. This Court should adopt the reasoning of the Seventh Circuit in *Knudsen II* relative to the triggering of CAFA jurisdiction by the addition of a new claim.

The Fifth Circuit cited *Knudsen II* in *Braud v. Trans. Serv. Co. of Illinois*[23] in footnote 16 of its opinion:

> "We do not decide when or whether the addition of new claims to a pre-CAFA case provides a new removal window. *See Knudsen v. Liberty Mutual Insurance Company* ("*Knudsen II*"), 435 F.3d 755 (7th Circuit 2006) (holding that the post-CAFA change in claims amounted to a substantially new suit and that there was no relation back because the old pleading did not furnish defendants with notice that plaintiffs contested any decision made by its associates/subsidiaries, which used a different adjustment system)."[24]

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[21] *Id.*

[22] *Knudsen II* at 758.

[23] *Braud v. Trans. Serv. Co. of Ill.*, 445 F.3d 801 (5th Cir. 2006)

[24] *Id.* at 808.

In citing *Knudsen II* in this manner, the Fifth Circuit left open the possibility that it would agree with the Seventh Circuit that a new claim would open a new window of removal for the defendants under CAFA. Further signaling its willingness to consider new claims as a CAFA trigger, the court in *Braud* also cited *Wright, Miller and Cooper* on the issue of events which may trigger removal after the initial commencement of a suit. The relevant part of *Wright, Miller and Cooper* cited by the court states in pertinent part:

> A different result is generally reached by the courts, however, if the pleading amendment provides (1) a new basis for removal or (2) **changes the character of the litigation so as to make it substantially a new suit.** [Emphasis added][25]

RELATION-BACK TEST CREATES INCONSISTENT RESULTS

The Fifth Circuit's use of a relation-back test to determine whether the new attorneys' fee claim relates-back to the original complaint is directly attributable to the flawed reasoning introduced by the Seventh Circuit in *dicta* in one of the first cases where the amendment of an existing complaint after the effective date of CAFA created a "commencement" issue. *Knudsen v. Liberty Mutual Insurance Company*, 411 F.3d 805 (7th Cir. 2005) ("*Knudsen I*").

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[25] Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction 3d § 3732, p. 321.

Several district and circuit courts seized upon the Seventh Circuit's "relation-back" approach in *Knudsen I* and the relation back test has become part of a significant body of law.[26]

The progeny of case law that has developed in the wake of *Knudsen I's* relation-back analysis contravenes the federal desire for the ease of applicability of jurisdictional principles. The instant question is the meaning of the word "commenced" for purposes of the application of CAFA. This is a question of *federal* statutory construction. Congress could not have intended that fifty different states' varying procedural rules would determine the applicability of this federal jurisdictional statute governing access to a federal forum. Congress expressly passed the statute to provide uniform federal jurisdiction over nationwide class actions to remedy inconsistences and abuses Congress found in state courts' treatment of nationwide class actions.[27]

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[26] *See, e.g., Santamarina v. Sears, Roebuck & Co.*, 466 F. 3d 570 (7th Cir. 2006) (action related back to original complaint under California law); *Prime Care of NE Kansas v. Humana Ins. Co.*, 447 F 3d 1284 (10th Cir. 2006); *Plubell v. Merck & Co.*, 8th Cir. 2006) (amendment related back to pre-CAFA commencement); *May's Distributing Co., Inc. v. Total Containment, Inc.*, 523 F. Supp. 2 d 1303 (M.D. Ala. 2007) (amendment of complaint did not commence a new action because amendment related back to filing of original complaint); *Cancino v. Yamaha Motor Corp.*, 494 F. Supp. 2d 664 (D.C. Ohio 2005); *Moniz v. Bayer, A.G.*, 447 F. Supp. 2d 31 (D.C. Mass. 2006).

[27] S.Rep. No. 109-14, at 5-7.

The issue of removal under the federal CAFA statute when a new claim is added will continuously be a recurring question of federal statutory construction that requires uniform analysis and uniform results.

EFFECTIVE DATE OF CAFA TIED TO COMMENCEMENT RESTRICTS ARTICLE III JUDICIAL POWER

The lines of *removal* jurisdiction and *original* jurisdiction have been blurred by the use of the word "commenced" in the effective date provision of CAFA. The removal statutes amended by CAFA are liberal. Section 1453 provides that a class action may be removed in accordance with section 1446 subject to the three liberalizing modifications of the requirements for removal: (1) eliminating the one-year deadline; (2) permitting unilateral removal by any defendant; and (3) allowing removal of a case in which any defendant is a citizen of the state where sued.[28] Section 1453 only limits class action removal if the class claims involve securities or corporate governance.

Here, Section 1453 does not limit the removal jurisdiction over the instant complaint. Section 1453 provides removal jurisdiction that is clear and absolute once the requirements of section 1446 are met. Because the removal statute absolutely allows Petitioner to remove, the Court's next inquiry is whether the court has original subject matter jurisdiction. (i.e., minimal diversity of citizenship and amount in controversy in excess of $5 million). All of the requirements for original

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[28] 28 U.S.C. §§ 1446, 1453.

jurisdiction under CAFA are met. Thus, any arguable Congressional "commencement" restriction would be in direct tension with the Article III power granted under section 1332.

Notwithstanding the internal inconsistency, the whole underlying relation-back premise has plagued the district and circuit courts even when, as in this case, the Fifth Circuit said that the relation-back test is "particularly unilluminating"[29]

CONCLUSION

For all the foregoing reasons, Petitioner respectfully requests that the United States Supreme Court grant review of this matter.

Respectfully submitted,

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[29] *Admiral*, 574 F.3d at 267.

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT FILED JULY 2, 2009

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 09-30121

ADMIRAL INSURANCE CO.,

Plaintiff - Appellant Cross-Appellee,

v.

DONALD W. ABSHIRE; BETTY JOAN NIX BUZZANCA; JESSE CHARLES ADAMS; GESELE DIAMOND ADAMS; DARROW A. ADAMS, ET AL.,

Plaintiffs - Appellees Cross-Appellants,

v.

STATE OF LOUISIANA, THROUGH THE OFFICE OF FINANCIAL INSTITUTIONS; STATE OF LOUISIANA, THROUGH THE OFFICE OF RISK MANAGEMENT,

Defendants - Appellants Cross-Appellees.

Appeal from the United States District Court
for the Middle District of Louisiana

Appendix A

Before WIENER, STEWART, and CLEMENT, Circuit Judges.

WIENER, Circuit Judge:

Plaintiff-Appellant Admiral Insurance Company ("Admiral") and Defendant-Appellant State of Louisiana, through the Office of Financial Institutions and through the Office of Risk Management (collectively, "Louisiana") appeal from the order of the district court remanding this case to state court. Louisiana claims that the Plaintiffs-Appellees (collectively, "Abshire et al.") commenced this putative class action-in which the proposed class includes at least 100 plaintiffs, the parties are minimally diverse, and the amount in controversy exceeds $5,000,000 exclusive of interest and costs-after the effective date of the Class Action Fairness Act of 2005 ("CAFA"),[1] entitling Louisiana to removal. Abshire et al. disagree, contending that they commenced this suit long before CAFA's effective date. They also cross-appeal the district court's denial of fees and costs associated with seeking remand. We affirm the district court's remand of the case to state court and its denial of fees and costs to Abshire et al.

I. FACTS AND PROCEEDINGS

Abshire and the other plaintiffs purchased life insurance policies, annuities, and corporate notes from three Louisiana companies: Public Investors Life

1. Pub. L. No. 109-2, 119 Stat. 4 (codified in scattered sections of 28 U.S.C.).

Insurance Co. ("PILCO"), Public Investors, Inc. ("PI"), and Midwest Life Insurance Co. ("MLI"). After all three companies failed, Abshire et al. sued Louisiana, alleging negligent, intentional, and criminal acts (regulatory and otherwise) that they claim contributed to these failures. A total of 1,383 plaintiffs were named as parties in three petitions[2] filed during the early 1990s in two different Louisiana courts. These actions were ultimately consolidated in Louisiana's 19th Judicial District Court for the Parish of East Baton Rouge (the "19th JDC").

After prolonged discovery and writ applications, and an earlier effort by Louisiana to remove to federal court, Abshire et al. filed an eighth amended complaint on March 24, 2003, which added claims against Louisiana's excess insurance carriers-like Admiral-and repleaded several claims. Then, as the most recent trial date approached in 2007, an advisory opinion from the Ethics Advisory Service Committee of the Louisiana State Bar Association determined that Abshire et al.'s attorneys would violate the Rules of Professional Conduct if they tried or settled the claims of plaintiffs with whom they had lost contact, using only the powers of attorney that these plaintiffs had executed at the time of retainer. Abshire et al.'s attorneys therefore filed motions to withdraw as to the 243 plaintiffs with whom they had lost contact.

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2. Louisiana law refers to a complaint as a petition; they serve the same purpose. *See* LA.CODE CIV. PROC. ANN. art. 854 (2008).

These ethics and communication issues were hampering efforts to settle, so the 19th JDC, which believed that the parties could benefit from mediation, granted Abshire et al. leave to amend their complaint a ninth time to seek class certification. That court concluded, and Abshire et al.'s attorneys apparently agreed, that only class certification could give the attorneys the authority needed to participate in mediation and to settle the case if possible.[3]

Abshire et al. filed the ninth amended complaint on May 30, 2008. It defined the proposed class as:

> All persons or entities in the United States who filed suit against the State of Louisiana and/or its Department of Insurance or Office of Financial Institutions for damages caused by the State's conduct in connection with the failure of [the three companies], and whose claim was consolidated into Civil Action No. 377,713 or No. 412,265.
>
> . . . .
>
> . . . Excluded from the Class are any persons or entities to the extent their claims

3. For discussions of the problems with resolving dispersed or complex, multiparty litigation, the utility of the class action device, and CAFA, see Edward F. Sherman, *The MDL Model for Resolving Complex Litigation If a Class Action Is Not Possible*, 82 TUL. L.REV. 2205, 2206-09 (2008).

> in Civil Action No. 377,713 or No. 412,265 have been resolved by a final, unappealable judgment, including those claims dismissed as a result of the rulings of the United States District Court, Western District of Louisiana, No. 06-1368.

In the ninth amended complaint, Abshire et al. also sought to recoup their "costs of suit, including reasonable attorneys' fees as provided by law." The eighth amended complaint had requested "[j]udgment against the Defendants jointly, severally, and in solido for attorneys' fees, judicial interest, costs, and all expenses of these proceedings and for any and all other general equitable relief."

Other case management problems inherent in such lengthy litigation arose during the 17 years that this suit has been pending in state court. For example, a number of plaintiffs have died. The 19th JDC allowed ex parte substitutions of survivors until Louisiana objected. That court then entered an order in 2004 conditionally dismissing the claims of the deceased plaintiffs unless counsel for Abshire et al. made proper substitution requests. Although the record is unclear on the point, it appears that at least five of the deceased plaintiffs had no survivor who could be substituted in 2004, so their claims presumably were dismissed. Louisiana claims that the same held true for at least 16 deceased plaintiffs at that time.

Appendix A

In addition to hearing the motions practice regarding substitutions for deceased plaintiffs, the 19th JDC dismissed the claims of all 281 plaintiffs who were only insureds or beneficiaries of a PILCO, PI, or MLI life insurance policy or annuity. These dismissals, as Louisiana concedes, are final and unappealable. The same order also held that "[a]ll rights possessed by any plaintiff in this litigation are preserved, and shall not in any way be affected by this order, save for those rights a plaintiff may possess as an insured or beneficiary under a life insurance policy or annuity." Louisiana contends that this portion of the order related to 219 "dual-capacity plaintiffs," each of whom was both (1) an insured or a beneficiary and (2) owned an investment at issue, the claims relating to which were not dismissed. Louisiana argues that the order is not final and unappealable as to those 219 dual-capacity plaintiffs because (1) those plaintiffs were not fully dismissed and (2) the order was not certified as a final judgment pursuant to Article 1915(B)(1) of the Louisiana Code of Civil Procedure for purposes of an appeal. These two additional management issues-the substitution problems arising out of the deaths of some of the plaintiffs and the management of the "dual-capacity" plaintiffs' claims-are part of Louisiana's argument that, by seeking class certification for the first time, the ninth amended complaint commenced a new suit for purposes of CAFA.

Immediately after Abshire et al. filed the ninth amended complaint, Louisiana again removed the action to federal court, this time claiming that, under CAFA,

subject-matter jurisdiction exists over Abshire et al.'s putative class action. Abshire et al. do not contest that if CAFA applies, the case satisfies CAFA's minimum-diversity and amount-in-controversy requirements. Instead, Abshire et al. sought remand on grounds that (1) this action was not "commenced" after CAFA's effective date (February 18, 2005), so CAFA is inapplicable, and (2) if CAFA applies, at least one mandatory exception to federal jurisdiction under CAFA requires remand. The magistrate judge concluded that the instant action commenced prior to CAFA's effective date and recommended that the case be remanded to state court. Because of that conclusion, the magistrate judge's report and recommendations did not address the two CAFA exceptions to jurisdiction that are presented in this appeal, namely, the "local controversy" and "primary state actor" exceptions.

Abshire et al. also requested that, pursuant to 28 U.S.C. § 1447(c), attorneys' fees and costs associated with seeking remand be awarded, arguing that Louisiana's attempt to remove the case was "objectively unreasonable." The magistrate judge determined that even though Abshire et al. prevailed on their motion to remand, Louisiana had not acted unreasonably because case law in the area was unsettled at the time of removal. The district court adopted the magistrate judge's report and recommendations in full and remanded the case to state court.

Both Louisiana's notice of appeal of the district court's remand order and Abshire et al.'s notice of

appeal of the denial of attorneys' fees and costs were timely filed pursuant to 28 U.S.C. § 1453(c)(1).[4] We granted permission to appeal and cross-appeal. As permitted by § 1453(c)(3)(A), all the parties agreed to a 120-day extension of 28 U.S.C. § 1453(c)(2)'s sixty-day time limit to "complete all action on [the] appeal."

4. The requirement that the petition be filed "not *less* than 7 days after entry of the order" granting or denying remand has been interpreted, counter-textually, to read "not *more* than 7 days." *E.g., Estate of Pew v. Cardarelli*, 527 F.3d 25, 27-28 (2d Cir. 2008) (collecting Third, Ninth, Tenth, and Eleventh Circuit cases). *Contra Spivey v. Vertrue, Inc.*, 528 F.3d 982, 984 (7th Cir. 2008) (Easterbrook, J.) ("Turning 'less' into 'more' would be a feat more closely associated with the mutating commandments on the barn's wall in Animal Farm than with sincere interpretation."). Even if we were tempted to rewrite a statute to mean exactly the opposite of its text, we resist that temptation, choosing instead to join the Seventh Circuit by concluding that this appeal was timely filed, even though the petition was filed fewer than seven days after the remand order. *See Spivey*, 528 F.3d at 984 ("To the extent that our colleagues in other circuits hold that a petition filed within seven days of the district court's order should be accepted, rather than thrown out with instructions to submit another once a week has passed, we concur. . . . An affirmative answer tracks FED. R.APP. P. 4(a)(2), which says that a premature notice of appeal remains on file and springs into effect when the decision becomes appealable."). We leave open the timeliness of a petition filed after seven days and note that Congress might wish to correct this apparent error in drafting.

II. ANALYSIS

A. The Remand Order

1. Standard of Review

We review de novo a district court's order remanding a case to state court.[5]

2. Merits

CAFA applies to " 'any civil action commenced on or after' " February 18, 2005.[6] It does not apply retroactively.[7] We must therefore determine whether the filing of Abshire et al.'s ninth amended complaint "commenced" a new suit for purposes of CAFA.[8] If not, CAFA does not apply and removal under its provisions was improper.

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5. *Preston v. Tenet Healthsys. Mem'l Med. Ctr., Inc.*, 485 F.3d 793, 796 (5th Cir. 2007). Ordinarily, we review a remand order for abuse of discretion, but that is a product of 28 U.S.C. § 1447(d)'s bar to review of most non-discretionary remand orders. *See Certain Underwriters at Lloyd's, London v. Warrantech Corp.*, 461 F.3d 568, 572 (5th Cir. 2006).

6. *Braud v. Transp. Serv. Co. of Ill.*, 445 F.3d 801, 803 (5th Cir. 2006).

7. *Id.*

8. For an excellent discussion of CAFA's commencement provision, see James M. Garner, *Congressional Welcome to Federal Court-The Class Action Fairness Act: Has the Party Just Begun?*, 80 TUL. L. REV. 1669, 1670-87 (2006).

We have held, as have all other circuits that have addressed the issue, that the date on which a civil action is "commenced" for purposes of CAFA is determined by state law.[9] We have further held that Louisiana considers a suit "commenced by filing of a pleading presenting the demand to a court of competent jurisdiction."[10] Thus, our default rule under Louisiana law is that, absent special circumstances, a suit is commenced only at the time the original petition is filed in a court of competent jurisdiction ("the default rule"). Therefore, Abshire et al. "commenced" this suit long before CAFA's effective date-on or about December 11, 1991, when at least one of the petitions for damages was filed in a Louisiana court competent to hear it.[11]

We have recognized, however, that at least one exception applies to the default rule, viz., when there are special circumstances, a suit may be "commenced" more than once. In *Braud v. Transport Service Co. of Illinois*, we held that, for purposes of CAFA, the addition of a new defendant to a case commences a new civil action as to that defendant.[12] Louisiana now asks us to extend our holding in *Braud* by recognizing an additional

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9. *Braud*, 445 F.3d at 803.

10. *Id.* at 804 (citing LA. CODE CIV. PROC. art. 421 (2008)).

11. The precise dates on which the two other petitions were filed does not appear in the record. No party disputes that the petitions were filed long before CAFA's effective date, which is all that is relevant.

12. 445 F.3d at 804.

exception to the default rule: specifically, that Abshire et al. commenced a new civil action when they filed the ninth amended complaint. Louisiana reasons that the latest complaint seeks class treatment for the first time and exposes Louisiana to additional liability via (1) a claim for attorneys' fees and costs, (2) the "resurrection" of claims held by deceased, substitution-less plaintiffs, and (3) the "resurrection" of the dual-capacity plaintiffs' previously dismissed claims. Noting that no new parties or claims have been added, Abshire et al. counter that merely adding class allegations is insufficient to constitute the commencement of a new suit. We address each contention in turn, cognizant that all appear to present questions of first impression in this circuit.

We may quickly dispose of Louisiana's contention that the mere addition of class allegations commences a new civil action for purposes of CAFA. Louisiana asserts that the term "civil action" in § 9 of CAFA must be read to mean "class action," meaning that any effort to seek class certification not sought before CAFA's effective date permits removal. This reading is in tension with the plain language of the statute; "civil action" is not synonymous with "class action." Conceptually, a "civil action" is a more extensive, more inclusive proceeding than a "class action," which is a subset of all civil actions.[13]

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13. This is evidenced by CAFA's definition of "class action." In 28 U.S.C. § 1332(d)(1)(B), "class action" is defined as "any civil action filed under rule 23 of the Federal Rules of Civil Procedure or similar State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative

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A "civil action" may commence before it becomes a "class action," and Congress selected the commencement of the "civil action" as the relevant event under CAFA's effective-date provision.

Louisiana's reading is also in tension with the Tenth Circuit's decision in *Pritchett v. Office Depot, Inc.*, which held that "Congress signaled an intent to narrow the removal provisions of [CAFA] to exclude currently pending suits" by deleting language that would have extended CAFA to "cases in which a class certification order is entered on or after the enactment date."[14] If "civil action" were treated as congruent with "class action" for purposes of § 9, then a class-certification order would commence a new suit. *Pritchett*, however, does not completely resolve the matter because, even though the certification order there post-dated CAFA, class allegations had been included in the complaint, which was filed pre-CAFA. We find this of no moment, however, because, as we have said, the date on which a civil action commences is determined according to state law, and Louisiana has not invited our attention to any authority holding that controlling state law deems a civil action to have been re-commenced when a complaint is amended to seek class treatment.

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persons as a class action." Louisiana's proffered reading would treat CAFA's definition of "class action" as the definition of "civil action" as well, which is clearly incorrect.

14. 420 F.3d 1090, 1094-95 (10th Cir. 2005).

To convince us that the default rule under the forum state's law-here, that a suit is commenced only at the time the original petition is filed in a court of competent jurisdiction-should not be applied in this context, Louisiana would have to make the same kind of persuasive showing that the newly added defendant made in *Braud*. There, we explained that it would be "a novel and unjust principle to make the defendants responsible for a proceeding of which they had no notice."[15] Louisiana cannot make a similarly persuasive showing here because the notice and due-process concerns that motivated our *Braud* holding are wholly absent from this suit. Abshire et al.'s ninth amended complaint adds not a single plaintiff of whose claim Louisiana was not already aware (the claim for attorneys' fees is the only arguable exception, which we address below). The proposed class definition is carefully tailored to limit the class to persons who were individual parties to the suits filed in the early 1990s. Even though some of those parties have died, requiring substitution of successors to preserve their claims in the absence of class treatment, Louisiana cannot argue that it lacked notice that the now-deceased plaintiffs for whom there are no successors to substitute were, at some point, claimants.

Neither is this a case like *Plummer v. Farmers Group, Inc.*, which presented a close call.[16] In *Plummer*,

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15. 445 F.3d at 805 (internal quotation marks omitted).

16. 388 F.Supp.2d 1310, 1313-14 (E.D. Okla. 2005). Neither is this case analogous to *Senterfitt v. SunTrust Mortgage, Inc.*, (Cont'd)

the initial complaint "involved one claim, one theory of recovery, and one Oklahoma plaintiff."[17] The *Plummer* plaintiffs amended their pleadings after CAFA's effective date, turning the suit into "a three count case with several theories of recovery asserted by thousands of potential plaintiffs spanning the United States."[18] The *Plummer* court thought that such an amendment presented a "unique circumstance in which some action other than filing a complaint in court is deemed to commence a lawsuit."[19] That is a doubtful proposition as to the mere addition of class allegations standing alone, especially when, as here, the class comprises only individuals or successors of individuals who were parties to the suits filed in the early 1990s.[20]

So, even if we were to adopt the *Plummer* court's analysis, Abshire et al.'s ninth amended complaint is not

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385 F. Supp. 2d 1377, 1378-79 (S.D. Ga. 2005), which involved an amendment adding an additional 16 years to the class period and "significantly increas[ing] the size of the potential class."

17. 388 F.Supp.2d at 1313.

18. *Id.*

19. *Id.* at 1314 (internal quotation marks omitted).

20. The Seventh Circuit has rejected the notion that the addition of class members to a suit involves the addition of new plaintiffs, implicitly repudiating the *Plummer* court's approach. *Schillinger v. Union Pac. R.R. Co.*, 425 F.3d 330, 334 (7th Cir. 2005); *Schorsch v. Hewlett-Packard Co.*, 417 F.3d 748, 750, 752 (7th Cir. 2005).

a "drastic modification to a petition by way of amendment which initiates a class action" that would present a "unique circumstance in which some action other than filing a complaint in court is deemed to commence a lawsuit."[21] Even if there were some question whether, to use Louisiana's colorful analogy, the claims of the now-deceased, substitution-less plaintiffs that it contends would be "resurrected" by class treatment are "new" claims or plaintiffs, we are nevertheless certain that any resurrection worked here does not work a "drastic modification" in the case by "significantly increas[ing] the size of the potential class."[22] Satisfied that merely melding the plaintiffs previously joined to a suit into a class for case management purposes is not itself sufficient to commence a new suit under CAFA, we move on to Louisiana's second argument, viz., that a new civil action is commenced under CAFA when parties or claims are added in an amended complaint.

In *Braud*, we limited our holding-that changes made to a complaint after filing may commence a new suit for purposes of CAFA-to a change that added new *defendants*, noting that "[w]e do not decide when or whether the addition of new claims to a pre-CAFA case provides a new removal window."[23] Other circuits have addressed the issue, however. In *Knudsen I*, the

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21. 388 F. Supp. 2d at 1313-14 (internal quotation marks omitted).

22. *Id.*; *Senterfitt*, 385 F. Supp. 2d at 1379.

23. 445 F.3d 801, 808 n. 16 (5th Cir. 2006).

Seventh Circuit wrote in dicta that adding "a novel claim for relief or add[ing] a new party" commences a new suit for purposes of CAFA.[24] *Knudsen I* also suggested a method by which courts should determine whether an amendment to a complaint asserts a "novel claim for relief," cautioning: "We imagine, though we need not hold, that . . . when a claim relates back to the original complaint (and hence is treated as part of the original suit)," it does not commence a new suit, but when a claim is "sufficiently independent of the original contentions[,] . . . it must be treated as fresh litigation."[25] *Knudsen I* made explicit that its relation-back analysis was modeled on the federal relation-back rule found in Federal Rule of Civil Procedure 15(c).[26] In *Knudsen II*, after reviewing the defendants' second attempt to remove the action when the plaintiffs made new claims for which the original pleadings did not provide notice, the court adopted this approach, but looked to state (Illinois) as well as federal relation-back law.[27]

The Tenth Circuit has also addressed the contention advanced here by Louisiana that a new civil action is commenced under CAFA when parties or claims are added in an amended complaint. In *Prime Care of*

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24. *Knudsen v. Liberty Mut. Ins. Co.* (*Knudsen I*), 411 F.3d 805, 807 (7th Cir. 2005) (Easterbrook, J.).

25. *Id.*

26. *Id.*

27. *Knudsen v. Liberty Mut. Ins. Co.* (*Knudsen II*), 435 F.3d 755, 757 (7th Cir. 2006) (Easterbrook, J.).

Northeast Kansas, LLC v. Humana Insurance Co., that court adopted a modified version of the relation-back approach that the Seventh Circuit had endorsed in *Knudsen I*, one that we discussed but did not adopt in *Braud*.[28] *Prime Care* held that the relation-back analysis applies to new claims and (contrary to *Braud*) that the addition of a defendant after CAFA's effective date did not necessarily commence a new civil action if state law would view the addition of the new defendant as relating back to the filing of the original complaint.[29] The Eighth Circuit approached the problem of a new named party similarly in *Plubell v. Merck & Co.*, a case in which the plaintiff amended the complaint to substitute the class representative after CAFA's effective date.[30] These cases present two options for purposes of CAFA: (1) Only the addition of a new defendant re-commences a suit; or (2) the addition of a new plaintiff or a new claim re-commences a civil action under CAFA, but only if the amended pleadings do not "relate back" to the original, pre-CAFA complaint. We need not consider choosing between these options on the facts of this case, however, as Abshire et al.'s ninth amended complaint relates back to the original complaint or, at the least, to one or more pre-CAFA complaints, such as the eighth amended version.

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28. 447 F.3d 1284, 1286, 1288 (10th Cir. 2006).

29. *Id.* at 1288-89. ("[W]hether a post-CAFA amendment triggers a substantive right of removal under CAFA by the affected parties depends on whether the amendment relates back to the pre-CAFA pleading that is being amended.").

30. 434 F.3d 1070, 1071-73 (8th Cir. 2006).

We begin our analysis by noting that the relation-back approach to commencement that other circuits employ, to the extent that it is ever analytically relevant, is particularly unilluminating in this case.[31] CAFA's commencement provision is a non-retroactivity provision, presumably motivated by the typical concerns that caution against retroactively applying a rule or statute, viz., the unjust disturbance of settled legal expectations on which a party has relied.[32] "Relation back is intimately connected with the policy of the statute of limitations."[33] The policies underlying statutes of

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31. *See* Garner, *supra* note 8, at 1683-86 ("*Knudsen I* speculated that a Rule 15 analysis could form the basis for evaluating an amendment that commenced a new action for CAFA applicability purposes. A Rule 15 analysis is primarily concerned, however, with providing a balance between allowing a plaintiff the ability to interrupt statutes of limitations and equitable considerations of protecting a defendant from stale claims. In contrast to the purposes underlying relation-back analysis, jurisdictional analyses have principally been concerned with constitutional issues and ease of application. It therefore appears that a jurisdictional rule dependent upon Rule 15 fairness considerations is not conceptually consistent with traditional jurisdictional analysis and can create inconsistent results." (footnotes omitted)).

32. *See Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-07 (1971) (explaining that a rule may be denied retroactive application if its application would work an injustice), *overruled by Harper v. Va. Dep't of Taxation*, 509 U.S. 86 (1993) (limiting *Chevron Oil's* approach for judicial decisions, but not repudiating the general policy behind non-retroactivity as explained in *Chevron Oil*).

33. FED R. CIV. P. 15 advisory committee's notes.

limitations—evidentiary concerns and repose—require that a plaintiff (1) commence suit (preserving the evidence) and (2) furnish the defendant notice of the suit and its claims (preventing repose from vesting).[34] When Rule 15(c) is satisfied, neither of these policies is impinged because the plaintiff commenced suit before the limitations period lapsed and the defendant knew or should have known of the suit and the claims, allowing him to preserve his evidence. In such a circumstance, at least according to the drafters of the Rules, it would work an injustice to time-bar a plaintiff's claim against a particular defendant not earlier named or a specific claim not earlier pleaded. Yet, an amendment to assert a new claim that "arose out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading,"[35] which thus satisfies Rule 15(c), might disturb settled legal expectations if such claim is based on a statute enacted after the defendant's conduct. And, an amendment to assert a claim that does not arise out of the transaction or occurrence described in the original complaint will not disturb settled legal expectations if brought within the statute-of-limitations period. Relation-back and non-retroactivity might overlap, but, given their logical independence, it is far from pellucid why the relation-back test should control our analysis of CAFA's non-retroactivity provision.

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34. *See Burnett v. N.Y. Cent. R.R. Co.*, 380 U.S. 424, 427 (1965).

35. FED R. CIV. P. 15(c)(1)(B).

In fact, the concerns balanced by the relation-back doctrine are virtually non-existent in this case. Louisiana was sued long ago on all of the claims, except, possibly, on the below-addressed claims for attorneys' fees and costs, by all of the members of the putative class. Even if we were to grant that some of those claims ran aground over the past 17 years and that a class action might revive them,[36] Louisiana lost any expectation of repose for claims brought by the named plaintiffs in this litigation concerning Louisiana's acts or omissions in the underlying matters when Abshire et al. filed this action in the early 1990s. And, at this point, any evidentiary concerns result from the length of the litigation, not from Abshire et al. sleeping on their rights. Neither are there notice concerns arising from the strategic choices made by Louisiana prior to the filing of the ninth amended complaint. Irrespective of whether it knew that this suit exposed it to class liability, Louisiana could not have removed this case prior to CAFA, so notice could not have affected its tactical decisions, at least not its choice of forum: It had none. Simply put, this is not a situation in which Louisiana could say, "Well, if I had known it was going to be a class action at the time it was filed, I'd have removed."

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36. It is unclear how deceased, substitution-less plaintiffs are in a position to recover anything, even from a class action. It is also unclear how the previously dismissed claims of the dual-capacity plaintiffs can be revived by the trial court in light of its earlier rulings on those claims. Of course, if the district court's holdings on substitution or the beneficiary-only claims are reversed on appeal, then Louisiana could be exposed to "additional" liability for those claims, but Louisiana faces that risk with or without class certification.

Even if we assume, arguendo, that it is appropriate to engage in the relation-back test found in either Louisiana law or the Federal Rules, we would conclude that the "resurrected" plaintiffs and claims clearly satisfy both. In *Giroir v. South Louisiana Medical Center*, the Louisiana Supreme Court held that the addition of plaintiffs relates back to the filing of the original petition if

> (1) the amended claim arises out of the same conduct, transaction, or occurrence set forth in the original pleading; (2) the defendant either knew or should have known of the existence and involvement of the new plaintiff; (3) the new and the old plaintiffs are sufficiently related so that the added or substituted party is not wholly new or unrelated; (4) the defendant will not be prejudiced in preparing and conducting his defense.[37]

The only "newly added" plaintiffs, i.e., those whom one could arguably suggest were not already parties to the litigation at some point prior to the ninth amended complaint, are the survivors of the earlier deceased plaintiffs who were not properly substituted before class certification was sought. If any such persons are in fact included in the class definition—and that is hardly clear, as the class definition is limited to those persons who were *already parties* to the three state-court

37. 475 So.2d 1040, 1044 (La. 1985).

petitions—they satisfy *Giroir*. As for federal law, the Seventh Circuit has held that class members are not new plaintiffs even when they were not previously joined to the action as individuals, a rule that we find persuasive and completely dispositive of Louisiana's argument here.[38] This reasoning also applies to the claims of the dual-capacity plaintiffs.

As for Louisiana's protestations that Abshire et al.'s request for attorneys' fees commences a new "civil action" against it, we need not address the dispute between the parties concerning the meaning of our holding in *Grant v. Chevron Phillips Chemical Co.*[39] Regardless whether Louisiana itself or a common fund might be on the hook for Abshire et al.'s fees at some future point, and regardless whether Louisiana could have been liable for attorneys' fees under state law before Abshire et al. sought class certification, Louisiana has invited our attention to no authority that holds a request for attorneys' fees does not relate back to an original filing. To the contrary, our research reveals just the opposite, given that attorneys' fees obviously arise out of the same transaction or occurrence that led to the filing of the original complaint, which is the test for relating back under both federal and Louisiana law.[40]

38. *Schorsch v. Hewlett-Packard Co.*, 417 F.3d 748, 750, 752 (7th Cir. 2005).

39. 309 F.3d 864, 874-75 (5th Cir. 2002).

40. *See* FED. R. CIV. P. 15(c)(1)(B); LA. CODE CIV. PROC. ANN. art. 1153 (2008) (announcing a "transaction[ ] or occurrence" (Cont'd)

Thus, whether we apply the Louisiana or the federal relation-back analysis to Abshire et al.'s ninth amended complaint, we are convinced that they obviously have not commenced a new "civil action." Likewise, when we apply our current default rule under Louisiana law, we are convinced that the ninth amended complaint does not commence a new civil action, because the petition was filed pre-CAFA in a court of competent jurisdiction and the *Braud* exception does not apply. As we reach the same result under either analysis, we decline to create another exception to the default rule under Louisiana state law. We therefore apply Louisiana law, which provides that a civil action commences only on the filing of the initial pleading in a competent court, and we hold that Abshire et al. commenced this civil action only once, and then long before CAFA's effective date. Remand to state court is appropriate because Abshire et al. commenced their suit before CAFA's effective date, and no other basis of jurisdiction appears from Louisiana's notice of removal. This conclusion obviates the need to address CAFA's mandatory exceptions to jurisdiction urged by Abshire et al.

We end our discussion of this issue by correcting the parties' error regarding *Braud*, which error is responsible for much of the confusion in this case. We

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test substantially similar to the federal standard); *cf. Ford v. Murphy Oil, U.S.A., Inc.*, 710 So.2d 235, 235 (La. 1997) (per curiam) (Calogero, C.J., concurring) (noting that an amendment to a petition to assert an individual claim after a class has been decertified relates back to the original petition).

made two separate holdings in *Braud.* First, we held that the addition of a *defendant* commences a new suit *as to that defendant* for purposes of CAFA. Second, we held that when a new suit is commenced by the addition of a new defendant, a new window of removability opens under 28 U.S.C. § 1446(b). Here, the parties erred by focusing their analyses on *Braud*'s second holding, sparring over whether the ninth amended complaint "provides (1) a new basis for removal or (2) changes the character of the litigation so as to make it substantially a new suit."[41] That, however, is the test for a new removal window under § 1446(b); in *Braud* we spoke of § 1446(b) as governing removability only *after* we had first determined that the addition of a new defendant commenced a new civil action as to that defendant. Given that precursor, we logically concluded that commencement of a new suit for purposes of CAFA was necessarily a substantial change in the character of the litigation, meaning that a new window of removability was opened under § 1446(b).[42] Indisputably then, whether an amendment to a complaint satisfies § 1446(b)'s test for removability is not determinative of whether a new suit has been commenced for purposes of CAFA. To read *Braud* otherwise would result in what the Tenth Circuit has described as "absurd consequences."[43] The parties' reading of *Braud* achieves

41. 445 F.3d 801, 806 (5th Cir. 2006) (internal quotation marks omitted).

42. *Id.* at 805-06.

43. *See Prime Care of Ne. Kan., LLC v. Humana Ins. Co.*, 447 F.3d 1284, 1289 (10th Cir. 2006) ("Moreover, the confusion of (Cont'd)

these "absurd consequences" by improperly conflating the question under CAFA (Has a new suit been commenced so that CAFA applies?) and the question under § 1446(b) (If jurisdiction exists, may the case be removed?). Even though § 1446(b)'s one-year time bar to the removal of suits based on diversity does not apply under CAFA,[44] there are still suits for which jurisdiction exists but for which removal is improper. Section 1446(b) and § 9 of CAFA ask different questions because they protect different policies: Section 1446 protects a plaintiff's choice of forum from a defendant's untimely effort to remove unless the defendant could not have removed the case before or did not have the same incentives to remove it; Section 9 of CAFA protects a plaintiff's choice of forum from Congress's post hoc expansion of the federal courts' subject matter

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a removal window [governed by § 1446(b)] with the substantive right to remove would lead to absurd consequences, which can be illustrated by a simple example. Because § 1446(b) grants the defendant thirty days to remove a case following service of the complaint, if a removal window after CAFA's effective date is enough to trigger application of CAFA, then CAFA actually applies to all civil actions commenced after *or up to thirty days before* its designated effective date—a bizarre result contrary to the plain wording of the Act's effective date."). *But see* Garner, *supra* note 8, at 1684 ("It stands to reason that because the defendants raised a potential jurisdictional problem [,viz., § 9 of CAFA], a court would look for answers in jurisdictional statutes. *Knudsen I* did as much by looking to 28 U.S.C. § 1446(b). . . .").

44. 28 U.S.C. § 1453(b) (2006).

jurisdiction unless the plaintiff attempts to use an old suit insulated from removal to bring new claims.

B. Fees and Costs

1. Standard of Review

We review for abuse of discretion a decision by the district court to grant or deny attorneys' fees and costs pursuant to 28 U.S.C. § 1447(c).[45]

2. Merits

As an initial matter, Louisiana claims that we lack jurisdiction to review the order of the district court denying attorneys' fees and costs. Although CAFA's limited exception to § 1447(d)'s bar to reviewing orders of remand does not mention reviewing orders relating to fees and costs, such orders would be reviewable even if the district court's remand order were not; § 1447(d) does not strip us of jurisdiction to review orders collateral to a remand order.[46] We therefore have jurisdiction.[47]

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45. *Hornbuckle v. State Farm Lloyds*, 385 F.3d 538, 541 (5th Cir. 2004).

46. *See id.*

47. In fact, Abshire et al. need not have petitioned for leave to cross-appeal this issue; they need only have cross-appealed it after we granted Louisiana permission to appeal the remand order. The prohibition against reviewing "[a]n order remanding

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On the merits of the district court's decision to deny fees and costs, we cannot say that there was an abuse of discretion. We apply the test announced by the Supreme Court in *Martin v. Franklin Capital Corp.*, which held that "absent unusual circumstances, attorney's fees should not be awarded [under § 1447(c)] when the removing party has an objectively reasonable basis for removal."[48] The statute does not embody either a strong preference for or a strong preference against fee awards.[49]

Even though there is some evidence in the record (e.g., Louisiana's prior effort to remove) that the instant removal had the "purpose of prolonging [the] litigation and imposing costs on" Abshire et al., it is equally true that, given the complexity of the instant commencement question, an award of fees might "undermin[e] Congress' basic decision to afford defendants a right to remove as a general matter, when the statutory criteria are satisfied."[50] After CAFA's effective date, Louisiana received an amended complaint that for the first time included class allegations. Louisiana had only our

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a case . . . on appeal or otherwise," 28 U.S.C. § 1447(d), might create thorny issues when fees and costs have been *denied* and we do not (or cannot) grant permission to appeal the underlying remand order, but we need not pass on that issue today.

48. 546 U.S. 132, 136 (2005).

49. *Id.* at 140.

50. *Id.*

decision in *Braud* as guidance on our views, and *Braud* expressly withheld judgment on at least one issue dispositive of the instant case. Although it may have been "objectively unreasonable" for Louisiana to conclude that the changes in Abshire et al.'s ninth amended complaint, at least in terms of their legal (as opposed to strategic) effect, would suffice to constitute an entirely new civil action, we cannot say that reaching the opposite conclusion was an abuse of discretion.

III. CONCLUSION

For the foregoing reasons, we AFFIRM the judgment of the district court remanding this case to the state court from which it had been removed by Louisiana and denying the claims of Abshire et al. for attorneys' fees and costs.

APPENDIX B — RULING OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF LOUISIANA FILED JANUARY 7, 2009

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

CIVIL ACTION

NO. 08-369-C

DONALD W. ABSHIRE, ET AL

VERSUS

THE STATE OF LOUISIANA, ET AL

RULING

The court has carefully considered the petition, the record, the law applicable to this action, and the Report and Recommendation of United States Magistrate Judge Stephen C. Riedlinger dated November 10, 2008. Objections and responses have been filed, which the court has considered.

The court hereby approves the report and recommendation of the magistrate judge and adopts it as the court's opinion herein.

Accordingly, the motion to remand filed by the plaintiffs will be granted, in part. The motion will be granted to the extent that the plaintiffs sought remand of this case to state court. The motion is denied as to

the plaintiffs' request for an award of attorney's fees and costs under § 1447(c).

Baton Rouge, Louisiana, December 30, 2008.

s/ Ralph E. Tyson
RALPH E. TYSON, CHIEF JUDGE
MIDDLE DISTRICT OF LOUISIANA

APPENDIX C — MAGISTRATE JUDGE'S REPORT OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF LOUISIANA DATED NOVEMBER 10, 2008

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

CIVIL ACTION

NUMBER 08-369-RET-SCR

DONALD W. ABSHIRE, ET AL.

VERSUS

THE STATE OF LOUISIANA, ET AL.

MAGISTRATE JUDGE'S REPORT

Before the court is the Motion to Remand and to Assess Costs and Fees Against Defendants filed by plaintiffs Donald W. Abshire, et al. Record document number 47. The motion is opposed by defendants Admiral Insurance Company, the Louisiana Department of Insurance (DOI) and the Louisiana Office of Risk Management (ORM), Lexington Insurance Company, and the State of Louisiana through the Office of Financial Institutions and the Louisiana Office of Financial Institutions (OFI).[1]

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1. Record document number 64, 66, 67, and 68, respectively. Plaintiffs filed a reply. Record document number 76.

Appendix C

Background and Procedural History

This action was originally filed in 1991 in state court by approximately 1,000 individual plaintiffs who purchased annuities, life insurance policies and corporate notes from three Louisiana companies, Public Investors Life Insurance Company (PILICO), Public Investors Incorporated (PI), and Midwest Life Insurance Company. Plaintiffs alleged that from 1987 through 1991, the State of Louisiana, by and through the DOI and the OFI, negligently and intentionally acquiesced in the plans of the owners of PILICO, PI and Midwest to transfer funds out of the plaintiffs' investment companies and the funds to support failing affiliated companies in which the plaintiffs had no legal interest. Specifically, the plaintiffs argued that the DOI and OFI gave regulatory approval to these transactions in order to protect the Louisiana Insurance Guaranty Association (LIGA) fund, which served as a guarantor for the insurance companies that received the transferred funds. Plaintiffs alleged that PILICO, PI and Midwest subsequently collapsed, which resulted in losses to the plaintiffs which were not protected by LIGA. Plaintiffs sought rescission of the purchases and restitution of all monies tendered and consideration paid, or alternatively, damages incurred as a result of these actions.

Plaintiffs amended their complaint multiple times throughout the course of the state court litigation. In addition to naming the State of Louisiana through DOI and OFI as a defendant, the Petitioners' Eighth

Amended Petition, filed in March 2003, added the State's general insurer, the ORM Self Insurance Fund, and numerous excess insurers.[2] On May 30, 2008, the plaintiffs filed Petitioners' Ninth Amended and Supplemental Petition (hereafter Ninth Amended Petition) seeking class certification.[3]

The State of Louisiana through the DOI, OFI and ORM (collectively the "State") removed this case and alleged that federal jurisdiction under the Class Action Fairness Act (CAFA), 28 U.S.C. § 1332(d) was triggered by the plaintiffs' Ninth Amended Petition. The State asserted diversity jurisdiction under CAFA was applicable since minimal diversity exists between the parties and that the $5,000,000 aggregate jurisdictional amount is satisfied.[4]

The Parties' Arguments

Plaintiffs moved to remand arguing that CAFA could not be applied retroactively and their suit commenced prior to the enactment of CAFA.[5] Plaintiffs argued that

2. Record document number 1, Notice of Removal, exhibit 2, ¶ 167.

3. *Id.*, exhibit 1.

4. Notice of Removal at ¶¶ 2, 3, and 4.

5. Plaintiff did not contest satisfaction of the general requirements of CAFA pursuant to § 1332(d) (2). Section 1332(d) (2) provides the standard criteria for satisfying diversity jurisdiction under CAFA and provides:

(Cont'd)

their Ninth Amended Petition relates back to the original 1991 filing date and the class action claims should not be considered a new suit commenced against the defendants. Plaintiffs recognized that the Fifth Circuit has held that an amended petition can be used to invoke CAFA. However, the court has limited the applicability of CAFA to amendments which add a new defendant, reasoning that such an amendment is a newly-commenced action as to the added defendant. Plaintiffs argued that because all of the defendants were added to the suit prior to the enactment of CAFA, none were entitled to invoke federal diversity jurisdiction under CAFA.

In the alternative, the plaintiffs argued that the exception to CAFA jurisdiction in § 1332(d) (5)(A) is applicable because the State is the primary defendant.

(Cont'd)

> (2) The district courts shall have original jurisdiction of any civil action in which the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs, and is a class action in which—
>
> (A) any member of a class of plaintiffs is a citizen of a State different from any defendant;
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> (B) any member of a class of plaintiffs is a foreign state or a citizen or subject of a foreign state and any defendant is a citizen of a State; or
>
> (C) any member of a class of plaintiffs is a citizen of a State and any defendant is a foreign state or a citizen or subject of a foreign state.

In support of this argument, the plaintiffs asserted that the liability of the excess insurer defendants is contingent on their contractual obligations to indemnify the State and the plaintiffs have not alleged any separate wrongful conduct by them. In addition to seeking remand of this case to state court, the plaintiffs also requested an award of reasonable costs and attorneys' fees incurred in connection with the removal.

Defendants argued that the plaintiffs' Ninth Amended Petition seeking class certification for the first time represents such a fundamental change in the nature of the lawsuit that a new suit has been commenced for the purpose of triggering CAFA.[6] Defendants relied on 28 U.S.C. § 1446(b) and cited case law to support finding that the addition of new claims which are significantly distinct from those in the prior pleadings may commence a new action removable under CAFA. Defendants argued that not only has the nature of the lawsuit changed by converting the individual plaintiffs' claims into a class action, but also a wholly new element of damages – in the form of attorney's fees and litigation costs – is now present since these kinds of damages are recoverable in a class action under both Louisiana law and the Federal Rules of Civil Procedure. Defendants argued that the Ninth Amended Petition cannot relate back to the original filing because the

6. The State's and the excess insurer defendants' opposition memoranda contain both overlapping and distinct arguments. For purpose of this report, their arguments will collectively be referred to as the defendants' arguments.

defendants are unfairly prejudiced by the lack of adequate notice of the nature of the new class claims.

Defendants also argued that the term "civil actions" referred to in § 9 of CAFA should be interpreted specifically as "class actions," and thus the statute applies to any class action commenced after CAFA's enactment. Accordingly, the plaintiffs' subsequent amendment converting these suits to a class action after CAFA's enactment date is enough to invoke CAFA jurisdiction. Defendants noted that all of the cases relied on by the plaintiffs were originally filed as class actions and so have no bearing on their interpretation of the statute.

Defendants argued for finding a jurisprudential exception to the CAFA § 9 time limitation that should be recognized because of the plaintiffs' forum manipulation. In support of this argument, the defendants referred to the recognized jurisprudential exception where the courts have disregarded the time limitations set forth in § 1446(b) on the basis of forum manipulation. Defendants argued that such an exception is applicable when the plaintiffs proceeded as individual parties since 1991, but after multiple trial fixings, continuances, failed mediation efforts, and acknowledged client contact problems, now change course and seek class certification.

Defendants also argued that the CAFA state actor exception does not apply because the state defendants are not primary defendants. Defendants further argued

that the statutory exception requires that all primary defendants be state defendants, which cannot be satisfied in this case. Defendants also noted that the court is not foreclosed from ordering relief against the State since the State removed the case, thereby voluntarily submitting to the judicial authority of the federal court and thus waiving Eleventh Amendment immunity.

Applicable Law

Class Action Fairness Act

Enacted on February 18, 2005, CAFA amended the diversity jurisdiction requirements for cases brought as class actions. Section 9 of CAFA provides that "[t]he amendments made by this Act shall apply to any civil action commenced on or after the date of enactment of this Act." Pub.L. 109-2, § 9. Pursuant to these revisions, most of which are found in § 1332(d), federal diversity jurisdiction is conferred over class actions where (1) the aggregate amount in controversy exceeds $5,000,000 dollars; (2) minimal diversity is met, i.e. any member of a class of plaintiffs is a citizen of a State different from any defendant; (3) the primary defendants are not states, state officials, or other government entities against whom the district court may be foreclosed from ordering relief; and (4) the number of members of the plaintiff class is 100 or more. *In re Textainer Partnership Securities Litigation*, 2005 WL 1791559 (N.D. Cal. July 27, 2005), *citing*, §§ 1332 (d) (2), (d) (5).

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The new class action diversity jurisdiction requirements are subject to mandatory grounds on which a court must decline jurisdiction. Under § 1332(d)(5)(A), when "the primary defendants are States, State officials, or other governmental entities against whom the district court may be foreclosed from ordering relief," diversity jurisdiction under CAFA shall not apply.

Resolution of this motion requires the determination of which defendants are "the primary defendants." The Fifth Circuit has held that "the plain text of § 1332(d) (5)(A), using the definite article before the plural nouns, requires that all primary defendants be states." *Frazier v. Pioneer Ams. LLC,* 455 F.3d 542, 546 (5th Cir. 2006). In *Frazier,* the Fifth Circuit cited guidance for interpreting this term which was set forth in Senate Report 109-014, and states in pertinent part:

> For purposes of class actions that are subject to subsections 1332(d) (3) and (d) (5) (A) , the Committee intends that "primary defend[a]nts" be interpreted to reach those defendants who are the real "targets" of the lawsuit -- i.e., the defendants that would be expected to incur most of the loss if liability is found. Thus, the term "primary defendants" should include any person who has substantial exposure to significant portions of the proposed class in the action, particularly any defendant that is allegedly liable to the vast majority of the members of the proposed

> classes (as opposed to simply a few individual class members). It is the Committee's intention with regard to each of these exceptions that the party opposing federal jurisdiction shall have the burden of demonstrating the applicability of an exemption. Thus, if a plaintiff seeks to have a class action remanded under section 1332 (d) (4) (A) on the ground that the primary defendants and two-thirds or more of the class members are citizens of the home state, that plaintiff shall have the burden of demonstrating that these criteria are met by the lawsuit. S. REP. 109-14, 43-44 (2005).

While it is well settled that the removing party bears the burden of establishing the facts necessary to show that federal jurisdiction exists, *see Allen v. R&H Oil & Gas Co.*, 63 F.3d 1326, 1335, *rhrg. denied*, 70 F.3d 26 (5th Cir. 1995), the legislative history of CAFA indicates that "[i]f a purported class action is removed pursuant to these [§ 1332(d)] jurisdictional provisions, the named plaintiff(s) should bear the burden of demonstrating that the removal was improvident (i.e., that the applicable jurisdictional requirements are not satisfied)." S. Rep. 109-14 at 42, 2005.[7] This reversal of the burden of proof was explained as follows:

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7. *Contra, Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446, (7th Cir. 2005), (court unpersuaded by legislative history regarding the reversal of the burden of proof).

> Allocating the burden in this manner is important to ensure that the named plaintiffs will not be able to evade federal jurisdiction with vague class definitions or other efforts to obscure the citizenship of class members. The law is clear that, once a federal court properly has jurisdiction over a case removed to federal court, subsequent events generally cannot "oust" the federal court of jurisdiction. While plaintiffs undoubtedly possess some power to seek to avoid federal jurisdiction by defining a proposed class in particular ways, they lose that power once a defendant has properly removed a class action to federal court. *Id.* at 43.

With respect to the mandatory grounds on which a court must decline jurisdiction under CAFA, the Fifth Circuit has held that the "'longstanding § 1441(a) doctrine placing the burden on plaintiffs to show exceptions to jurisdiction buttresses the clear congressional intent to do the same with CAFA.'"[8]

Another deviation from the general rules of removal found in the legislative history which instructs that CAFA's jurisdictional provisions "should be read broadly, with a strong preference that interstate class action should be heard in a Federal court if removed by any

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8. *Preston v. Tenet Healthsystem Memorial Medical Center, Inc.*, 485 F.3d 804, 813 (5th Cir. 2007), *citing, Frazier v. Pioneer Ams. LLC*, 455 F.3d 542, 545 (5th Cir. 2006).

defendant." *In re Textainer Partnership Securities Litigation, supra, citing,* 151 Cong. Rec. H723-01, H-727 (2005). "[I]f a Federal court is uncertain . . . the court should err in favor of exercising jurisdiction over the case." *Id.*

Attorney's Fees in State Court Class Actions

Under state law, in a class action the named class representative may be awarded an attorney's fee as provided by LSA-C.C.P. art. 595. In its entirety, art. 595(A) reads as follows:

> The court may allow the representative parties their reasonable expenses of litigation, including attorney's fees, when as a result of the class action a fund is made available, or a recovery or compromise is had which is beneficial, to the class.

The operation of art. 595(A) was extensively explained by the Fifth Circuit in *Grant v. Chevron Philips Chemical Co.*, 309 F.3d 864, 872-73 (5th Cir. 2002).

> Literally, this article is expressed (1) permissively, using "may" rather than "shall"; and (2) conditionally, authorizing the court to allow the representative parties to recover litigation expenses (which expressly include attorney's fees) only if the class litigation is the producing cause of either (a) a common "fund" that is available to the class

or (b) some other type of "recovery or compromise" that is beneficial to the class. We first note that, on its face, this code article does not condition the court's authority to grant fees on the class's being successful to the point of judgment; rather, art. 595(A) requires only the availability of either a common fund or some other result that is beneficial to the class: The fund or the other recovery can eventuate either from a judgment or from some non-judicial disposition, such as settlement, compromise, alternative dispute resolution, or the like.

We next note that the plain wording of art. 595(A) does not literally limit the permissible sources available for attorney's fees. Facially, the code article does not restrict the source of such court-allowed fees to the fund or other recovery for the benefit of the class; the article requires only that such benefit result from the class litigation. Neither does the article either expressly authorize or expressly prohibit the court's tagging the defendant with such fees. The Official Revision Comments to art. 595(A) can be read as the Legislature's elimination of any question of source by stating its intention that attorney's fees allowed to the class representatives under authority of art. 595(A) are "to be paid out of the fund or benefits made available" by the class representatives' litigation efforts. In

Louisiana's code-drafting scheme, however, such comments are not "the law," but rather are instructive or clarifying. Like legislative history, they are most compelling when the code article itself is ambiguous - and we are not prepared to say that art. 595(A) is ambiguous. Instead, we assume arguendo that art. 595(A) does not authorize the court to assess attorney's fees to the class action defendant; rather, that only the common "fund" or the other "benefits" made available to the class by the class representatives litigation are eligible sources of such fees.

Under that assumption, art. 595(A) remains a fee-shifting statute, but the shifting is not between the class and the defendant. Instead, the shifting is between the class representatives and the rank and file members of the class. Furthermore, such shifting is not restricted to common fund cases (which this case is not): The court can allow fees to the class representatives either from "a fund made available" or from "a recovery or compromise . . . which is beneficial" to the class. Thus, in a non-fund case like this one, each class member's damage recovery could be reduced by the court and shifted to the class representatives, even if art. 595 (A) were construed narrowly to prohibit the court from assessing attorney's fees to the losing tortfeasor.

> In every Louisiana class action, then, the class representatives could receive attorney's fees from either (1) the defendant directly, pursuant to a separate attorney's fee statute, or (2) the non-representative members of the class indirectly, as a result of art. 595(A)'s fee shifting and attribution.

Grant, 309 F.3d at 872-73 (internal footnotes omitted).

Attorney's Fees and Costs for Improper Removal

There is no automatic entitlement to an award of attorney fees under 28 U.S.C. § 1447(c). The clear language of the statute, which provides that the "order remanding the case may require payment of just costs and any actual expenses including attorney fees, incurred as a result of the removal," makes such an award discretionary. The Supreme Court set forth the standard for awarding fees under § 1447(c) in *Martin v. Franklin Capital Corporation*, 546 U.S. 132, 126 S.Ct. 704 (2005):

> [T]he standard for awarding fees should turn on the reasonableness of the removal. Absent unusual circumstances, courts may award attorney's fees under § 1447(c) only where the removing party lacked an objectively reasonable basis for seeking removal. Conversely, when an objectively reasonable basis exists, fees should be denied. *See, Hornbuckle v. State Farm Lloyds*, 385 F.3d

> 538, 541 (5th Cir. 2004); *Valdes v. Wal-Mart Stores, Inc.*, 199 F.3d 290, 293 (5th Cir. 2000). In applying this rule, district courts retain discretion to consider whether unusual circumstances warrant a departure from the rule in a given case. For instance, a plaintiff's delay in seeking remand or failure to disclose facts necessary to determine jurisdiction may affect the decision to award attorney's fees. When a court exercises its discretion in this manner, however, its reasons for departing from the general rule should be "faithful to the purposes" of awarding fees under § 1447(c).

Id., at 711.

The court must consider the propriety of the removing party's actions at the time of removal, based on an objective view of the legal and factual elements in each particular case, irrespective of the fact that it was ultimately determined that removal was improper. *Id.*; *Miranti v. Lee*, 3 F.3d 925, 928 (5th Cir. 1993) ; *Avitts v. Amoco Production Co.*, 111 F.3d 30, 32 (5th Cir.), *cert. denied*, 522 U.S. 977, 118 S.Ct. 435 (1997).

Appendix C

Analysis

CAFA Removal Based on a New Civil Action

Plaintiffs relied primarily on *Braud v. Trans. Serv. Co. Of Illinois* to argue that only an amendment adding a new defendant commences a new action for purposes of CAFA.[9] Their argument is unpersuasive. The Fifth Circuit's holding in *Braud* only addressed the particular situation in that case, *i.e.* an amendment adding a new defendant. The *Braud* Court did not discuss whether new claims added by an amendment could commence a new action for the purpose of CAFA.[10] *Braud's* holding does not preclude this court from finding that an amendment which significantly alters the nature of the claims commences a new suit under CAFA § 9.

The *Braud* court's holding was based in part on the fact that an amendment to a complaint can revive the period for removal when the amendment provides either (1) a new basis for removal or (2) changes the character of the litigation so as to make it substantially a new suit.[11] The Fifth Circuit further reasoned that the amendment

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9. 445 F.3d 801 (5th Cir. 2006).

10. The Fifth Circuit stated specifically in footnote 16: "We do not decide when or whether the addition of new claims to a pre-CAFA case provides a new removal window." *Braud,* 445 F.3d at 808, n. 16., *citing, Knudsen v. Liberty Mut. Ins. Co. (Knudsen II),* 435 F.3d 755 (7th Cir. 2006).

11. *Id.* at 806.

adding the defendant "'change[d] the character of the litigation so as to make it a substantially new suit.'"[12] Based on this language, it appears that the Fifth Circuit has left open the possibility that newly-amended claims that change the character of the litigation could commence a new suit for purposes of CAFA.

Plaintiffs also cited *Weekley v. Guidant Corp.* and argued that a post-CAFA amendment converting individual claims to a class action is irrelevant to the inquiry of whether an action was commenced prior to CAFA's effective date.[13] This case is not controlling or persuasive since it does not follow the line of case law, including that adopted by the Fifth Circuit in *Braud*, which has broadened the applicability of CAFA § 9.

Plaintiffs argued that the statute cannot be retroactively applied in this case. While it is undisputed that CAFA does not apply retroactively, the defendants argued that when the plaintiffs converted their suits to a class action, they commenced a new suit under CAFA. Defendants founded their argument on the assertion that the conversion created a wholly new element of recoverable damages–attorneys' fees and litigation costs– which significantly increased their exposure. This argument has some support in the case law, but it is ultimately not sufficient to support federal jurisdiction in this case.

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12. *Id.*

13. 392 F.Supp.2d 1066 (E.D. Ark. 2005).

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Defendants relied on *Knudsen v. Liberty Mutual Insurance Co. (Knudsen II)*[14] and *Plummer v. Farmers Group Inc.*[15] to support finding that the plaintiff's Ninth Amended Petition commenced a new litigation for purposes of the CAFA.[16] In *Knudsen* the plaintiffs filed a state class action prior to the enactment of CAFA against defendant Liberty Mutual Insurance Company. Plaintiffs alleged that Liberty Mutual mishandled its medical cost and utilization database when adjusting demands for payment of medical bills. The state court subsequently entered a default judgment on the merits of the case due to the defendant's egregious conduct during the discovery process and left the decision on the damages pending.

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14. 435 F.3d 755, 758 (7th Cir. 2006). The *Knudsen* state action was previously removed under CAFA based on a proposed amendment to their class definition to include those plaintiffs insured by Liberty Mutual Fire Insurance Company. *Knundsen v. Liberty Mut. Ins. Co.*, 411 F.3d 805 (7th Cir. 2005). Defendants argued that the amendment effectively began a new suit against Liberty Fire which was commenced after the enactment of CAFA. The case was remanded based on the fact that Liberty Mutual remained the only defendant in the case and that the state judge had not acted on the plaintiff's proposal by adding either new claims or new parties.

15. 388 F.Supp.2d 1310(E.D. Ok. 2005).

16. The other cases cited by the defendants have been considered. These two cases are discussed because they provide the most support for the defendants' argument.

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After the default judgment was entered and after CAFA was enacted, the plaintiffs sought to hold Liberty Mutual responsible for all policies issued by any of its subsidiaries or affiliates. Plaintiffs also asked that all claims for payment by all insureds on all of these policies everywhere in the nation be covered by the default and proposed that they be certified to represent a nationwide class. After this request, the state court certified the class as follows:

> All insureds of Liberty Mutual Insurance Company, its affiliates and subsidiaries (collectively 'Liberty Mutual'), their third party beneficiaries and their assignees who submitted medical bills covered by a Liberty Mutual insurance policy, and whose claims were paid for less than the medical charge, based upon the application of a medical cost and utilization database.

Liberty Mutual then removed the case on the basis of CAFA. It asserted that the plaintiffs' change in the relief requested and the resulting certified class converted the original state court action into a new action. Defendant argued that CAFA was now applicable because the "new" action was commenced after CAFA's enactment. Although the district court remanded the action because the defendant had not been changed, the Seventh Circuit reversed and held that "a novel claim tacked on to an existing case commences new

litigation for purposes of the Class Action Fairness Act."[17] The court explained that while the original complaint sought damages based on Liberty Mutual's own adjustment work using the contested procedure, the certified class definition created new claims against Liberty Mutual for payment on all of its affiliates' policies, even if the claims had not been adjusted by Liberty Mutual.[18]

The analysis in *Knudsen II* is persuasive – but it does not apply in this case. The Ninth Amended Petition did not allege any claim which exposed the defendants to an award of contract-based attorney's fees or litigation expenses. The foregoing explanation in *Grant v. Chevron* of how art. 595(A) is applied leads to the conclusion that the Ninth Amended Petition does not expose the defendants to a new or additional kind of damages – namely, attorney's fees and litigation expenses. The eligible sources of the art. 595(A) fees are only the common fund or other benefits made available to the class by the class action, and it "does not authorize the court to assess attorney's fees to the class action defendant." It merely permits shifting and attribution of fees and expenses to the class representatives from the "rank and file" members of the class, from an available fund, recovery or compromise that is beneficial to the class. *Grant*, 309 F.3d at 872. In these circumstances, the defendants are exposed to new or additional liability because that is not the nature of

17. *Id.* at 758.

18. *Id.* at 757.

the attorney's fee award allowed by art. 595(A). Therefore, the rational of *Knudsen II* is inapplicable.

The *Plummer* case originated as a single plaintiff presenting a single cause of action, based on an alleged material breach of contract, against three insurance company defendants. Like *Knudsen, Plummer* involved the defendants' use of a computer program to adjust claims for automobile collision loses. After CAFA was enacted, the plaintiff amended her petition to add thousands of new plaintiffs, allege a fraud cause of action, a bad faith cause of action, and a request for class certification. Defendants removed the case shortly thereafter. The district court conducted an extensive analysis of the factors which must be considered when determining whether the claims in an amended complaint relate back to the filing date of the original petition. The court determined that for the purposes of Rule 15(c), Fed.R.Civ.P., the amended petition did not relate back to the original filing date and instead was the equivalent to filing a new cause of action. Therefore, it was removable under CAFA.[19]

The *Plummer* court's determination was not based on the plaintiff's conversion of the case to class action. In fact, the court did not even mention the conversion to a class action in its analysis. Much like *Knudsen II*, the *Plummer* court focused on the extensive substantive changes made in the amended petition. In contrast to the extensive substantive changes made in Plummer's

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19. *Plummer*, at 316-17.

amended petition, the plaintiff's Ninth Amended Petition consists almost entirely of allegations to establish class action status. Moreover, the plaintiffs' proposed class definition (including the sub-classes) does not include any person who is not already a plaintiff in the removed state court cases.[20]

Plaintiff's Ninth Amended Petition did not so significantly change the substantive character of the litigation as to commence a new civil action for the purpose of removal under CAFA.

Parts of the defendants' memoranda discuss the perceived unfairness of permitting the plaintiffs to now convert this 17-year-old case to a class action, and the plaintiff's patent failure to meet the central requirement of a class action – that joinder of the plaintiffs is impractical – since they are already joined as plaintiffs. These are arguments to be considered in determining whether a class should be certified. They do not assist

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20. Record document number 1, Notice of Removal, exhibit 1, ¶ 1(A). For example, the sub-class in ¶ 1(A) (i) is defined as follows:

> All persons or entities in the United States who filed suit against the State of Louisiana and/or its Department of Insurance or Office of Financial Institutions for damages caused by the State's conduct in connection with the failure of Public Investors Life Insurance Company, Inc., and whose claim was consolidated into Civil Action No. 377, 713 or NO. 412, 265 (captioned *Donald W. Abshire, et al., vs. The State of Louisiana, et al.*)

the court in determining whether the case was properly removed.

Attorney's fees and cost under § 1442(c)

Considering all the circumstances, particularly the lack of settled case law interpreting the application of CAFA in similar circumstances, it was not objectively unreasonable for the defendants to remove this case.

Conclusion

Plaintiffs' Ninth Amended Petition does not expose the defendants to a new or additional kind of damages, nor does it significantly change the substantive character of the litigation. Consequently, the plaintiffs' Ninth Amended Petition does not commence a new civil action for the purpose of removal under CAFA.

RECOMMENDATION

It is the recommendation of the magistrate judge that the Motion to Remand filed by the plaintiffs be granted, in part. The motion should be granted to the extent that the plaintiffs sought remand of this case to state court. The motion should denied as to the plaintiffs' request for an award of attorney's fees and costs under § 1447(c).

Baton Rouge, Louisiana, November 10, 2008.

s/ Stephen C. Riedlinger
STEPHEN C. RIEDLINGER
UNITED STATES MAGISTRATE JUDGE

APPENDIX D — RELEVANT STATUTES

8 U.S.C.A. § 1332

United States Code Annotated Currentness
Title 28. Judiciary and Judicial Procedure (Refs & Annos)
Part IV. Jurisdiction and Venue (Refs & Annos)
Chapter 85. District Courts; Jurisdiction (Refs & Annos)

§ 1332. Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between—

(1) citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

For the purposes of this section, section 1335, and section 1441, an alien admitted to the United States for permanent residence shall be deemed a citizen of the State in which such alien is domiciled.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $75,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) For the purposes of this section and section 1441 of this title—

(1) a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business, except that in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business; and

(2) the legal representative of the estate of a decedent shall be deemed to be a citizen only of the same State as the decedent, and the legal representative of an infant or incompetent shall be deemed to be a citizen only of the same State as the infant or incompetent.

Appendix D

(d)(1) In this subsection—

(A) the term "class" means all of the class members in a class action;

(B) the term "class action" means any civil action filed under rule 23 of the Federal Rules of Civil Procedure or similar State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action;

(C) the term "class certification order" means an order issued by a court approving the treatment of some or all aspects of a civil action as a class action; and

(D) the term "class members" means the persons (named or unnamed) who fall within the definition of the proposed or certified class in a class action.

(2) The district courts shall have original jurisdiction of any civil action in which the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs, and is a class action in which—

(A) any member of a class of plaintiffs is a citizen of a State different from any defendant;

(B) any member of a class of plaintiffs is a foreign state or a citizen or subject of a foreign state and any defendant is a citizen of a State; or

(C) any member of a class of plaintiffs is a citizen of a State and any defendant is a foreign state or a citizen or subject of a foreign state.

(3) A district court may, in the interests of justice and looking at the totality of the circumstances, decline to exercise jurisdiction under paragraph (2) over a class action in which greater than one-third but less than two-thirds of the members of all proposed plaintiff classes in the aggregate and the primary defendants are citizens of the State in which the action was originally filed based on consideration of—

(A) whether the claims asserted involve matters of national or interstate interest;

(B) whether the claims asserted will be governed by laws of the State in which the action was originally filed or by the laws of other States;

(C) whether the class action has been pleaded in a manner that seeks to avoid Federal jurisdiction;

(D) whether the action was brought in a forum with a distinct nexus with the class members, the alleged harm, or the defendants;

(E) whether the number of citizens of the State in which the action was originally filed in all proposed plaintiff classes in the aggregate is substantially larger than the number of citizens from any other State, and the citizenship of the other members of the proposed

class is dispersed among a substantial number of States; and

(F) whether, during the 3-year period preceding the filing of that class action, 1 or more other class actions asserting the same or similar claims on behalf of the same or other persons have been filed.

(4) A district court shall decline to exercise jurisdiction under paragraph (2)—

(A)(i) over a class action in which—

(I) greater than two-thirds of the members of all proposed plaintiff classes in the aggregate are citizens of the State in which the action was originally filed;

(II) at least 1 defendant is a defendant—

(aa) from whom significant relief is sought by members of the plaintiff class;

(bb) whose alleged conduct forms a significant basis for the claims asserted by the proposed plaintiff class; and

(cc) who is a citizen of the State in which the action was originally filed; and

(III) principal injuries resulting from the alleged conduct or any related conduct of each defendant were incurred in the State in which the action was originally filed; and

(ii) during the 3-year period preceding the filing of that class action, no other class action has been filed asserting the same or similar factual allegations against any of the defendants on behalf of the same or other persons; or

(B) two-thirds or more of the members of all proposed plaintiff classes in the aggregate, and the primary defendants, are citizens of the State in which the action was originally filed.

(5) Paragraphs (2) through (4) shall not apply to any class action in which—

(A) the primary defendants are States, State officials, or other governmental entities against whom the district court may be foreclosed from ordering relief; or

(B) the number of members of all proposed plaintiff classes in the aggregate is less than 100.

(6) In any class action, the claims of the individual class

members shall be aggregated to determine whether the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs.

(7) Citizenship of the members of the proposed plaintiff classes shall be determined for purposes of paragraphs (2) through (6) as of the date of filing of the complaint or amended complaint, or, if the case stated by the initial pleading is not subject to Federal jurisdiction, as of the date of service by plaintiffs of an amended pleading, motion, or other paper, indicating the existence of Federal jurisdiction.

(8) This subsection shall apply to any class action before or after the entry of a class certification order by the court with respect to that action.

(9) Paragraph (2) shall not apply to any class action that solely involves a claim—

(A) concerning a covered security as defined under 16(f)(3)[1] of the Securities Act of 1933 (15 U.S.C. 78p(f)(3)[2] and section 28(f)(5)(E) of the Securities Exchange Act of 1934 (15 U.S.C. 78bb(f)(5)(E));

(B) that relates to the internal affairs or governance of a corporation or other form of business enterprise and that arises under or by virtue of the laws of the

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1. So in original. Reference to "16(f)(3)" probably should be preceded by "section".

2. So in original. Probably should be "77p(f)(3)".

State in which such corporation or business enterprise is incorporated or organized; or

(C) that relates to the rights, duties (including fiduciary duties), and obligations relating to or created by or pursuant to any security (as defined under section 2(a)(1) of the Securities Act of 1933 (15 U.S.C. 77b(a)(1)) and the regulations issued thereunder).

(10) For purposes of this subsection and section 1453, an unincorporated association shall be deemed to be a citizen of the State where it has its principal place of business and the State under whose laws it is organized.

(11)(A) For purposes of this subsection and section 1453, a mass action shall be deemed to be a class action removable under paragraphs (2) through (10) if it otherwise meets the provisions of those paragraphs.

(B)(i) As used in subparagraph (A), the term "mass action" means any civil action (except a civil action within the scope of section 1711(2)) in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact, except that jurisdiction shall exist only over those plaintiffs whose claims in a mass action satisfy the jurisdictional amount requirements under subsection (a).

(ii) As used in subparagraph (A), the term "mass action" shall not include any civil action in which—

(I) ail of the claims in the action arise from an event or occurrence in the State in which the action was filed, and that allegedly resulted in injuries in that State or in States contiguous to that State;

(II) the claims are joined upon motion of a defendant;

(III) all of the claims in the action are asserted on behalf of the general public (and not on behalf of individual claimants or members of a purported class) pursuant to a State statute specifically authorizing such action; or

(IV) the claims have been consolidated or coordinated solely for pretrial proceedings.

(C)(i) Any action(s) removed to Federal court pursuant to this subsection shall not thereafter be transferred to any other court pursuant to section 1407, or the rules promulgated thereunder, unless a majority of the plaintiffs in the action request transfer pursuant to section 1407.

(ii) This subparagraph will not apply—

(I) to cases certified pursuant to rule 23 of the Federal Rules of Civil Procedure; or

(II) if plaintiffs propose that the action proceed as a class action pursuant to rule 23 of the Federal Rules of Civil Procedure.

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(D) The limitations periods on any claims asserted in a mass action that is removed to Federal court pursuant to this subsection shall be deemed tolled during the period that the action is pending in Federal court.

(e) The word "States", as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico.

Appendix D

28 U.S.C.A. § 1441

United States Code Annotated Currentness
Title 28. Judiciary and Judicial Procedure (Refs & Annos)
View the full text of all sections at this level Part IV. Jurisdiction and Venue (Refs & Annos)
View the full text of all sections at this level Chapter 89. District Courts; Removal of Cases from State Courts (Refs & Annos)

§ 1441. Actions removable generally

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(c) Whenever a separate and independent claim or cause of action within the jurisdiction conferred by section 1331 of this title is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters in which State law predominates.

(d) Any civil action brought in a State court against a foreign state as defined in section 1603(a) of this title may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending. Upon removal the action shall be tried by the court without jury. Where removal is based upon this subsection, the time limitations of section 1446(b) of this chapter may be enlarged at any time for cause shown.

(e)(1) Notwithstanding the provisions of subsection (b) of this section, a defendant in a civil action in a State court may remove the action to the district court of the United States for the district and division embracing the place where the action is pending if—

(A) the action could have been brought in a United States district court under section 1369 of this title; or

(B) the defendant is a party to an action which is or could have been brought, in whole or in part, under section 1369 in a United States district court and arises from the same accident as the action in State court, even if the action to be removed could not have been brought in a district court as an original matter.

The removal of an action under this subsection shall be made in accordance with section 1446 of this title, except that a notice of removal may also be filed before trial of the action in State court within 30 days after the date on which the defendant first becomes a party to an action under section 1369 in a United States district court that arises from the same accident as the action in State court, or at a later time with leave of the district court.

(2) Whenever an action is removed under this subsection and the district court to which it is removed or transferred under section 1407(j) has made a liability determination requiring further proceedings as to damages, the district court shall remand the action to the State court from which it had been removed for the determination of damages, unless the court finds that, for the convenience of parties and witnesses and in the interest of justice, the action should be retained for the determination of damages.

(3) Any remand under paragraph (2) shall not be effective until 60 days after the district court has issued an order determining liability and has certified its intention to remand the removed action for the determination of damages. An appeal with respect to the liability determination of the district court may be taken during that 60-day period to the court of appeals with appellate jurisdiction over the district court. In the event a party files such an appeal, the remand shall not be effective until the appeal has been finally disposed of. Once the remand has become effective, the liability

determination shall not be subject to further review by appeal or otherwise.

(4) Any decision under this subsection concerning remand for the determination of damages shall not be reviewable by appeal or otherwise.

(5) An action removed under this subsection shall be deemed to be an action under section 1369 and an action in which jurisdiction is based on section 1369 of this title for purposes of this section and sections 1407, 1697, and 1785 of this title.

(6) Nothing in this subsection shall restrict the authority of the district court to transfer or dismiss an action on the ground of inconvenient forum.

(f) The court to which a civil action is removed under this section is not precluded from hearing and determining any claim in such civil action because the State court from which such civil action is removed did not have jurisdiction over that claim.

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28 U.S.C.A. § 1446

United States Code Annotated Currentness
Title 28. Judiciary and Judicial Procedure (Refs & Annos)
View the full text of all sections at this level Part IV. Jurisdiction and Venue (Refs & Annos)
View the full text of all sections at this level Chapter 89. District Courts; Removal of Cases from State Courts (Refs & Annos)

§ 1446. Procedure for removal

(a) A defendant or defendants desiring to remove any civil action or criminal prosecution from a State court shall file in the district court of the United States for the district and division within which such action is pending a notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure and containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served upon such defendant or defendants in such action.

(b) The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

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If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable, except that a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action.

(c)(1) A notice of removal of a criminal prosecution shall be filed not later than thirty days after the arraignment in the State court, or at any time before trial, whichever is earlier, except that for good cause shown the United States district court may enter an order granting the defendant or defendants leave to file the notice at a later time.

(2) A notice of removal of a criminal prosecution shall include all grounds for such removal. A failure to state grounds which exist at the time of the filing of the notice shall constitute a waiver of such grounds, and a second notice may be filed only on grounds not existing at the time of the original notice. For good cause shown, the United States district court may grant relief from the limitations of this paragraph.

(3) The filing of a notice of removal of a criminal prosecution shall not prevent the State court in which such prosecution is pending from proceeding further, except that a judgment of conviction shall not be entered unless the prosecution is first remanded.

(4) The United States district court in which such notice is filed shall examine the notice promptly. If it clearly appears on the face of the notice and any exhibits annexed thereto that removal should not be permitted, the court shall make an order for summary remand.

(5) If the United States district court does not order the summary remand of such prosecution, it shall order an evidentiary hearing to be held promptly and after such hearing shall make such disposition of the prosecution as justice shall require. If the United States district court determines that removal shall be permitted, it shall so notify the State court in which prosecution is pending, which shall proceed no further.

(d) Promptly after the filing of such notice of removal of a civil action the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the notice with the clerk of such State court, which shall effect the removal and the State court shall proceed no further unless and until the case is remanded.

(e) If the defendant or defendants are in actual custody on process issued by the State court, the district court shall issue its writ of habeas corpus, and the marshal shall thereupon take such defendant or defendants into his custody and deliver a copy of the writ to the clerk of such State court.

(f) With respect to any counterclaim removed to a district court pursuant to section 337(c) of the Tariff Act of 1930, the district court shall resolve such counterclaim in the same manner as an original complaint under the Federal Rules of Civil Procedure, except that the payment of a filing fee shall not be required in such cases and the counterclaim shall relate back to the date of the original complaint in the proceeding before the International Trade Commission under section 337 of that Act.

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28 U.S.C.A. § 1453

United States Code Annotated Currentness
Title 28. Judiciary and Judicial Procedure (Refs & Annos)
View the full text of all sections at this level Part IV. Jurisdiction and Venue (Refs & Annos)
View the full text of all sections at this level Chapter 89. District Courts; Removal of Cases from State Courts (Refs & Annos)

§ 1453. Removal of class actions

(a) Definitions.—In this section, the terms "class", "class action", "class certification order", and "class member" shall have the meanings given such terms under section 1332(d)(1).

(b) In general.—A class action may be removed to a district court of the United States in accordance with section 1446 (except that the 1-year limitation under section 1446(b) shall not apply), without regard to whether any defendant is a citizen of the State in which the action is brought, except that such action may be removed by any defendant without the consent of all defendants.

(c) Review of remand orders.—

(1) In general.—Section 1447 shall apply to any removal of a case under this section, except that notwithstanding section 1447(d), a court of appeals may accept an appeal from an order of a district court

granting or denying a motion to remand a class action to the State court from which it was removed if application is made to the court of appeals not less than 7 days after entry of the order.

(2) Time period for judgment.—If the court of appeals accepts an appeal under paragraph (1), the court shall complete all action on such appeal, including rendering judgment, not later than 60 days after the date on which such appeal was filed, unless an extension is granted under paragraph (3).

(3) Extension of time period—The court of appeals may grant an extension of the 60-day period described in paragraph (2) if—

(A) all parties to the proceeding agree to such extension, for any period of time; or

(B) such extension is for good cause shown and in the interests of justice, for a period not to exceed 10 days.

(4) Denial of appeal.—If a final judgment on the appeal under paragraph (1) is not issued before the end of the period described in paragraph (2), including any extension under paragraph (3), the appeal shall be denied.

(d) Exception.—This section shall not apply to any class action that solely involves—

(1) a claim concerning a covered security as defined under section 16(f)(3) of the Securities Act of 1933 (15 U.S.C. 78p(f)(3)[1]) and section 28(f)(5)(E) of the Securities Exchange Act of 1934 (15 U.S.C. 78bb(f)(5)(E));

(2) a claim that relates to the internal affairs or governance of a corporation or other form of business enterprise and arises under or by virtue of the laws of the State in which such corporation or business enterprise is incorporated or organized; or

(3) a claim that relates to the rights, duties (including fiduciary duties), and obligations relating to or created by or pursuant to any security (as defined under section 2(a)(1) of the Securities Act of 1933 (15 U.S.C. 77b(a)(1)) and the regulations issued thereunder).

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1. So in original. Probably should be "77p(f)(3)".

Appendix D

Louisiana Code of Civil Procedure article 595

West's Louisiana Statutes Annotated Currentness
Louisiana Code of Civil Procedure Acts 1960, No. 15 (Refs & Annos)
Book I. Courts, Actions, and Parties
Title II. Actions
View the full text of all sections at this level Chapter 5. Class And Derivative Actions (Refs & Annos)
View the full text of all sections at this level Section 1. Class Actions

Art. 595. Award of expenses of litigation; security for costs

A. The court may allow the representative parties their reasonable expenses of litigation, including attorney's fees, when as a result of the class action a fund is made available, or a recovery or compromise is had which is beneficial, to the class.

B. The court, on contradictory motion at any stage of the proceeding in the trial court prior to judgment, may require the plaintiff in a class action to furnish security for the court costs which a defendant may be compelled to pay. This security for costs may be increased or decreased by the court, on contradictory motion of any interested party, on a showing that the security furnished has become inadequate or excessive.

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Pub. L. 109-2, 2005, 119 Stat. 4

SEC. 9. EFFECTIVE DATE

The amendments made by this Act shall apply to any civil action commenced on or after the date of enactment of this Act.

Approved February 18, 2005.

PL 109-2, 2005 S 5

APPENDIX E — LIST OF RESPONDENTS

Admiral Insurance Company; Abbott, Claudine; Abshire, Donald; Abshire, Joseph; Abshire, Rose; Adams, Alberta; Adams, Ann; Adams, Darrow A.; Adams, Gesele Diamond; Adams, Jesse Charles, Sr; Adams, Jessie Charles, Jr; Adams, Todd; Albin, Dianne; Albin, Gerald; Alexander, Alice Lucille; Alexander, James Donald; Allen, Carolyn; Allen, Doris; Allen, Geralyn; Allen, Joey; Allen, Loffie; Allen, Vickie; Amberg, Larry; Anchor, Trust; Anderson, Alfred; Anderson, Alfred Ray; Anderson, Barney Dean; Anderson, Camilla; Anderson, Cloria; Anderson, Debra; Anderson, Laverne; Anderson, Michael; Anderson, Randall; Anderson, Rebecca; Anderson, Robert; Anderson, Tommy Lee; Anderson, Wesley; Anderson, Wilbert; Arnold, Glen; Arnold, Richard, III; Ashley, Charles Roderick; Ashworth, James; Atchison, James; Succession of Atchison, Katherine Flossie McRae Succession of Atwell, Evelyn; Atwell, Mark; Atwell, William; Auzenne, Dewey T.; Auzenne, Lucy Mae Lemelle; Awtry, Norma Jean; Aymond, Maydean; Aymond, Mildred; Aymond, Mildred Bordelon; Aymond, Renee (Deville); Aymond, Stuart; Bailey, Nadine Brinkly; Ball, David; Ball, Derek; Ball, James; Ball, Janie; Ball, Margie Yvonne Johnson; Ball, Teresa Balsar, John, Sr.Balthazar, Carroll Balthazar, Faustina Adele Barthold, Gladys Bartlett, Thelma Bassett, Mary Louis Bates, Linda Faye Bates, Willie Dorothy Beck, Betty AnnBell, Geraldine Marie Dudley Benoit, Mildred Bergeron, Arthur William Bergeron, Elsie Stuart Bergeron, Jeanne Bergeron, Lyle Bernard, Chaille Claude, III Bernard, Frederick Robert Bernard, John KerrBesson, DonaldBiller, Anne Billingsley, MarjorieBillingsley, OscarBird, SusanBlakesley,

RossBlakesley, SadieBlakesley, Shelly AnnBlanchard, CharleneBlanchard, IV, Pierre Valmont Blanchard, Lawrence Blanchard, Wendy Bollenbacher,Leola Bolton, Joella Bolton, Shelly Bolton, Travis Bonner, Dorothy Bonner, James, Sr., Bonner, Joyce, Bordelon, Cilton, Bordelon, Doris, Bordelon, Randy James, Bordelon, Ray John, Borden, John, Borden, Priscilla, Borden, Randall, Borne, John Berchmans, Borne, Leonie Isaac, Borne, Peter James, Bossier, Leonard, Bouck, Polly, Boudreaux, Louis, Bourgeois, Gustave, Jr., Bourgois, Jamie Lynn, Bourque, Joseph Roy, Sr., Bousman, Richard Leroy, Bright Morning Star, Baptist Church (Douglas, B.), Brocata, Barbara Ann, Brocato, Thomas Anthony, Brodnax, Johnnie; Brouillette, Sarah Duggan, Brouillette, Woodruff, Broussard, Virginia Sheridan, Brown, Crawford; Brown, Kenneth, Brown, Murlee T., Bruce, Cynthia Bernadette (Boudreaux), Bruce, Nolan, Bruce, Valerie, Bryant, Cordis, Bryant, Rosemary, "Burnley, Anne Teer, , Burroughs, Roy Dean, Butler,, Felton, Butler, Harris Knox, Jr., Butler, Myrtle, Buzzanca, Betty Joan Nix, Byars, Nell, Caire, Carol, Caire, Edward P., Caire, Rosalind Ann, Caldwell, Carlin, Caldwell, Donna, Caldwell, Jean, Caldwell, Odis, Campbell, Christopher, Campbell, Henry Cole, Campbell, John, Campbell, Louise, Cantrelle, Murphy, Carlos, Ashleigh Rene, Carlos, Jon, Carroll, Beverly, Carroll, Robert, Cason,, Emmitt Ray, Cason, Ramona, Castilla, Judith, Cato, Bobby, Cato, Patsy, Causey, Joyce, Causey, Robert Hawkins, Causey, Robin, Cavallero, Harold John, Jr., Chamberlain, Beverly, Chamberlain, Wilmer, Chambers, Dianne Lawhorne, Chambers, Jack, Champagne, David, Chandler, Carolyn, Chandler, John

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Earl, Chandler, Virginia, Chapman, Steven , M.D., Chapman, Virginia, Chapman, William Chapman, Sr., Chapman, William Franklin, Jr., Charrier, Douglas, Charrier,, Hazel, Chatelain, Germaine, Chauffe, JoLaine, Cheek, John, Cheek, Louis, Cheek, Mary, Janell, Cheek, Verna, Chestnut, Aaron, Jr., Chestnut, Mina, Chevalier, Bennie Mae, Chevalier, Curtis, Chevalier, John, Chevalier,, Mildred G., Chevallier, Odom, Jr., Chevallier, Ruth, Childers, Margie Fay, Church of God in Christ Clark, Paul, Jr. M.D. Clark-Waddell, Frances Phelps Clay, Barbara,Clay, Charlotte; Clay, James Basil, Jr.,Clay, Martha Alice; Clay, Susan Alice M.D.; Click, Bobby; Click, Connie; Colburn, Elsie Marie Hooter; Colburn, Howard E.; Cole, Rita; Coleman, Betty; Coleman, Cammie; Coleman, David Kyle; Coleman, Deborah; Coleman, Donald; Coleman, James Michael; Coleman, Kempa; Coleman, Linda; Coleman, Perry; Coleman, Viki Marissa; Collins, Daniel, Jr.; Collins, Thelma Rae Hopkins; Combs, Susan; Cook, Frank; Cook, Sandra; Corley, A. Edward; Corley, Hazel; Corley, Rachel Anise; Corley, Robert Allen, III; Cortez, Virgie Falcoust; Cothern, Billy; Cothern, Gwendolyn Sue; Covington, Ellen Estelle Bernard; Covington, Jason; Covington, John; Covington, John M., Jr.; Covington, Yolanda Joy (Livingston) (Deceased ?); Cox, Elaine; Coyle, Bob; Coyle, Joyce; Crowe, Verdie; Curley, Kelly; Dadbeh, Deborah; Daniel, Thomas B.; Daspit, Albert; Daspit, Vera; Davidson, Herman; Davidson, Kevin; Davidson, Ora Lee Hickman; Davidson, Verda Faye; Davis, April Marie; Davis, Benjamin; Davis, Catherine Joyce; Davis, Elmo; Davis, Elmo Van Buren; Davis, John Edmond; Davis, Lois; Davis, Nancy Dell; Davis, William; Davitt,

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Stephen, Lt. Col. Retired; Day, Ann Wiltz; Dean, Patricia V.; Deason, Melba; Deason, Ralph; Deboer, Frederick; Deboer, Suryamani L.; DeMoss,Terry (Goodrich); Denison, Lucille; Derveloy, Betty C.; Derveloy, Thomas Shafter, Sr.; Desselle, Eldred; Desselle, Sabia; Dewitt, Patricia; Digilormo, Derek; Digilormo, Louis Richard; Digilormo, Richard Densil; Donaldson, Mary Jane Weber; Dowden, Alvin, Jr.; Dowden, Glenn; Dowden, Marie; Doyle, Millard; Dozier, Albert; Dreyfuss, Henry Elaine; DuBose, Debbie; DuBose, Trina; Ducarpe, Cordell; Duck, Eric; Duck, Kimberly; Ducote, Cecile; Ducote, Howard; Ducote, Melba Dutton; Ducote, Norman; Ducote, Patti; Dudley, Gregory; Dudley, Silas, Jr.; Dudley, Tyrone; Dudley, Zaneta; Dudley, Zazel; Dunbar, Gail; Dunbar, Steve; Duncan, Penny Clark; Dutton, Nathaniel; Eden, Angela; Eden, Merline; Edwards, Aubrey; Edwards, Cynthia; Edwards, Dorothy; Edwards, Ernest; Edwards, Ernest Lanier; Edwards, Mary Virginia; Edwards, Shelby; Edwards, Wanda Beth; Elam, Arthur Lee; Elam, Eloise Kidd; Engelcke, Erick Andreas; Engelcke, Stefanie; Engelcke, Tommye Jeane Morris; Erbestie, James; Erbestie, Stephanie Brock; Eschette, Donna; Eschette, Raymond, Jr.; Faciane, Theresa; Falgout, Beatrice Perez; Falgout, Charles Marion; Falgout, Charles Michael; Falgout, Jennifer; Falgout, Mary Schully (aka Betty); Falgout, Nolan, Jr.; Falgout, Nolan, Sr.; Falgout, Ronald; Falgout, Ronald F. Jr.; Farrelly, Donald; Farrelly, Doris; Faul, Donna; Faul, Eula Mae Pitre; Faul, Joseph Edgar; Faul, Robert; Faul, Timothy; Faust, Marla Lacombe; Fields, Betty Ivy; Fields, Bruce Benton; Fields, Laverne; Firestone, Bryan; Firestone, Karen Hickson; Firestone,

Margaret; Firestone, R. Bernard; Firmin, Hazel; Fisher, Florence; Fisher, Joy Lacour; Fisher, Norman Fisher; Fitzpatrick, Mary Suzette Jacob; Fitzpatrick, Thomas James; Flick, Dorothy; Flick, Thomas; Flowers, Inez; Floyd, Delores Nethery; Fogle, Sadie; Folse, Elonia; Folse, Roy; Folse, Roy Gerald, Jr; Folse, William Mark; Fontenot, Billy; Fontenot, David; Fontenot, Gilbert; Fontenot, Lucille; Fontenot, Philip; Fontenot, Ryan; Fontenot, Virginia; Foster, Cecile; Foster, Charles, Jr.June 23, 2008; Foster, Joselyn Pousson; Francis, Annette; Francis, Gus Edward, Jr.; Francis, Gus Edward, Sr.; Francis, Loraine; Franz, David L., Sr.; Franz, David Loewen, Jr.; Franz, Josephine; Frederic, Carol G.; Frederic, Frank P.; Freeman, Louise Anderson; Frost, John J.; Frye, Minnie Lee; Frye, W. Ray; Funderburk, Floyd K.; Funderburk, Martha A.; Galland, Warren; Gamble, Debra B.; Gamble, Eva Law; Gamble, Eva Lois; Gamble, Herman Dewey; Gamble, Herman Dohrmiere; Gamble, Jason Blake; Gamble, Linda Marie; Gaspard, Miriam; Gaupp, Ella Wayne; Gaupp, Myles; Gauthier, Dewon J.; Gauthier, Evans; Gauthier, Kenneth Paul; Gauthier, Mary Nell; Gauthier, Pauline; Gauthier, Troy Michael; Gay, Jessie; Gentry, Catherine; Gentry, G.W.; George, Odelia Smith South; Gilcrease, Duncan; Gilcrease, John, Jr.; Gilcrease, Mary; Gillespie, Albert; Gillespie, Helen; Glaser, Diane Guerra; Glaser, Jacob; Glorioso, Penny; Goings, Marie Sheridan; Golden, Jennifer Covington; Goudeau, Joseph; Goudeau, Rodia; Green, James Edward; Green, Paula; Greer, Drayton; Greer, Jutta; Greer, Kate; Greer, Robin Kent; Greer, Stacy; Gremillion, Joyce; "Groseclose, Fairfax; Guilbeau, Levy; Guillory, Chris; Guillory, Dorothy; Guillory, Emily;

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Guillory, Eulalie; Guillory, Evelyn; Guillory, Glenn; Guillory, James N. , Jr,; Guillory, James Ned; Guillory, Ricky; Haggart, Clara Beatrice; Haggart, Gary Wayne; Haggart, Marion Sidney; Haggart, Tommy Burns; Haggart, Warren; Haggart, Warren Jr.; Hale, Helen Elizabeth Crow; Hampton, Albert Levy; Hampton, Audrey Lee Demer; Hampton, Lester; Hampton, Lester Eugene, Jr.; Hanna, James W., Jr.; Hanna, Mary; Harden, Katrella Cabrini Myer; Harper, Catherine; Harper, Willard; Harris, Corey George; Harris, George; Harris, Gladys; Harris, Marvelyn; Harruss, Donna Ducote; Hart, John C., Jr.; Hart, John C., Sr.; Hart, John Hart, Trustee for Professional Medical Retirement Trust; Hart, Leslie; Harvey, Callie; Harvey, Charles; Harvey, Ellena; Harvey, Frances Gayle; Hathorn, David; Hawthorne, Vernon; Hayes, Calvin, Jr.; Hayes, Esther C. (Sue); Hayes, Frances; Hayes, James; Hayes, Jimmie Sue; Haymon, Norman; Hays, Sara Schmidt; Heard, Eddie; Hickman, Claude Marion; Hickman, Marie; Hill, Corine; Hill, Dagne; Hill, Doris; Hill, Edna; Hill, W. H.; Hindelang, Alvin; Hineman, Faye; Hines, Ann Carter; Hobgood, Dollie; Holland, Sandra; Holland, Shannon; Holley, Charlotte; Hollifield, Elizabeth Chevalier; Holmes, Bobby Edward; Holmes, Don, Jr.; Holmes, Duanna; Holmes, Mimell; Hood, Bobbie; Hood, Lorrie Allen; Hudson, Edrie; Hudson, Mark; Hudson, Marshall; Hudspeth, Ferol Ann Wagner; Hughes, Alice M.; Hurst, Theople; Hurst, Warren; Hutchinson, Jerald; Irving, Harriet Stancil; Ivy, Robert, Jr.; Jackson, Elizabeth; Jackson, Howard Jr.; Jackson, Howard, Sr.; Jackson, James; Jackson, Marilyn R.; Jackson, Shrye; Jackson, Vickie; Jacob, Bryan; Jacob, Curtis; Jacob, Ernest

Joseph; Jacob, Ernest Joseph, Jr.; Jacob, Linda; Jacob, Linnea; Jacob, Nola Stub; Jacob, Olga; Jacobs, D. P. Drake (aka Dennis); Jacobs, Marc; Jacobs, Mary; Jameson, Edna; Jameson, James; Jantz, Eugene; Jeansonne, Crystal; Jefferson, Joseph Orlandia; Jefferson, Lynette Carolyn; Jennings, Edward; Jennings, Vernelle W. Hughes; Jiles, Arstella L.; Johnson, Cora; Johnson, Jean Evelyn Burnett; Johnson, Jeffrey; Johnson, Jessy; Johnson, Karolin; Johnson, Paul; Johnson, Ricky; Johnson, Stephanie Anne Gaupp; Johnson, Valerie Sue; Johnston, Leamon Eugene; Jones, Bessie; Jones, James; Jones, Miriam Lee; Jones, Ruby; Jones, Tamica; Jones, Theodis; Jones, Torrance Ray; Joseph, Nora; Joseph, Prince Farrell; Juneau, Juanita Shivers; Kangas, Judy; Kangas, Lawrence; Kastner, Joan; Kelley, David L.; Kelley, David L., Jr.; Kelley, Doreen; Kelley, Lutilla Harris; Kelly, Mary Ella; Kelly, Shadonna Lashawan (Hardy); Kelly-Myles, Daisy; Kenerson, Serial Dale; Kenerson, Shamon Jolace; Kenerson, Vanetta Jackson; Kennair, Barbara Sercovich; Kennair, Donald J., Sr.; Kennair, Donald Joseph, III; Kennair, Ronald; Kennair, Wyatt Theriot; Kennedy, Jim; Kieff, Neva; Kilpatrick, Carl Dwayne; Kilpatrick, Carol Jean; Kilpatrick, Carol Vallery; Kilpatrick, Zuma; Kimball, Janet; Kimball, Norris; King, Emily Sloane; Kinsey, Minnie Rice; Kinsey, Roosevelt, Jr.; Kirkham, Faye; Kirkham, Marshall; Kranzmen, Jennifer Pousson; Kurrich, John Major; Kurrich, Marcia Vigil; Lachney, Faye; Lachney, Havage; Lacombe, Delores; Lacombe, Ellis; LaCombe, Gerald; Lacombe, Gwendolyn; LaCombe, Narcelle; Lacour, Douglas James; Lacour, Hardy; Lacour, Mark John; Lacour, Rick Paul; Lacour,

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No. 09-398

Supreme Court, U.S.
FILED
OCT 30 2009
OFFICE OF THE CLERK

In The

Supreme Court of the United States

THE STATE OF LOUISIANA,

Petitioner,

v.

DONALD W. ABSHIRE, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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QUESTIONS PRESENTED

1. Whether Petitioners have presented compelling reasons to grant the petition where the Petitioners' CAFA issue is premised on an unresolved issue of state law, which is whether Louisiana Code of Civil Procedure article 595(A) creates a substantive right to a new claim for attorneys' fees.

2. If so, whether Petitioners have presented compelling reasons to grant the petition where there is no conflict among the Circuit Courts arising from the use of relation-back analysis in determining if a post-CAFA amendment to a pre-CAFA state court petition gives rise to a second commencement date.

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STATEMENT OF THE CASE

In December of 1991, Respondents filed this case in state court as a cumulated civil action on behalf of over 1,000 individual owners of annuities, life insurance policies, and corporate notes purchased from three Louisiana companies: Public Investors Life Insurance Company, Public Investors Incorporated, and Midwest Life Insurance Company. Respondents allege misconduct by the State of Louisiana, by and through the Department of Insurance and the Office of Financial Institutions, for allowing improper transfers of funds out of the companies in which the Respondents had invested, causing these companies to collapse.[1]

At the time of commencement of the litigation, many of the Respondents were elderly. Over the approximately eighteen years of this litigation, many have passed away, have otherwise become incapacitated, or have been displaced from their homes due to Hurricanes Katrina and Rita which struck Louisiana in 2005. Understandably, communication with all named plaintiffs became more difficult. In 2006 and 2007, when settlement discussions arose, Respondents submitted a request for an opinion to the Ethics Advisory Service Committee of the State Bar of

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[1] This is a case arising from the corrupt regime of Douglas D. Green, Commissioner of Insurance of the State of Louisiana during the 1990s. For a glimpse of the tortuous background of the circumstances surrounding his tenure as Commissioner of the Louisiana Department of Insurance, *see United States v. Green*, 964 F.2d 365 (5th Cir. 1992).

Louisiana ("Ethics Committee") to determine if Respondents' counsel had sufficient authority to accept a settlement offer on behalf of Respondents.[2] As required by state ethics rules, counsel for the Respondents then filed a motion to withdraw as counsel for the 243 Respondents with whom counsel had lost communication over the prior sixteen years of litigation. After the state trial judge denied the motion, and in light of the opinion issued by the Ethics Committee,[3] Respondents amended their petition on May 30, 2008, with leave of the court, merely changing the procedural vehicle of the case from a consolidated direct action to a class action.[4] The amended petition did not include a new claim for recovery of statutory attorneys' fees, as alleged by Petitioners. Louisiana procedural rules require fact pleading. All petitions in this matter have included a prayer for

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[2] *See* Appendix ("App.") 1. At inception of this case, a committee comprised solely of Plaintiffs was formed. That committee possessed a power of attorney for each client's claim in order to make decisions for each client, including the authority to settle and release all claims. No member of Plaintiffs' counsel was a member of this committee.

[3] *See* App. 6.

[4] *See* App. 16. On August 2, 2007, counsel for Respondents submitted a letter to Judge Bates of the 19th Judicial District Court, State of Louisiana, in which this case is pending, delineating the options available to Respondents, given the communication difficulties and the recently issued opinion by the Ethics Committee, for effectuating settlement or other resolution of the case. Judge Bates then indicated that conversion to a class action could be an appropriate procedural vehicle for the case.

attorneys' fees to the extent such an award may be allowable under any applicable Louisiana substantive law.[5] Louisiana Code of Civil Procedure ("La. CCP") article 595(A), as a procedural statute that does not confer any independent right to recover attorneys' fees, was not specifically pleaded as a substantive grant for recovery of attorneys' fees.

Petitioners then removed the case to the United States District Court for the Middle District of Louisiana, asserting federal question jurisdiction pursuant to the Class Action Fairness Act ("CAFA").[6] Respondents moved to remand the case, and on January 7, 2009, the United States District Court for the Middle District of Louisiana granted the motion, adopting Magistrate Judge Riedlinger's Report in its entirety. Upon appeal by the Petitioners, the Fifth Circuit Court of Appeals affirmed the District Court's remand of the case to state court for lack of federal jurisdiction. The Fifth Circuit held that the amended

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[5] All prior amendments to the petition in the instant action have been legally proper. Plaintiffs amended their petition five times in the first year of litigation to add new plaintiffs. All subsequent amendments, including the Ninth Amended Petition, have been made with express leave of the court.

[6] 28 U.S.C. § 1332(d). This is Petitioners' second unsuccessful attempt at removal. *See* App. 21 for a graphic representation of Petitioners' forum-shopping tactics in this case; *see also* App. 24 for evidence of Petitioners' admission of forum shopping. The complete recording of the April 28, 2009 oral argument is available from the Fifth Circuit at http://www.ca5.uscourts.gov through the Oral Arg. Recordings Page (pertinent portion begins at minute 50:23).

Complaint did not include a new claim. Although unnecessary to the outcome, the Fifth Circuit also performed a federal and state relation-back analysis, finding alternative bases under both the federal and state relation-back tests to support its decision to remand the case to state court.

REASONS FOR DENYING THE PETITION

Petitioners present no compelling reasons for their Petition for a Writ of *Certiorari* ("Petition") to be granted. Specifically, Petitioners fail to demonstrate that La. CCP article 595(A) creates a new statutory claim for attorneys' fees substantial enough to constitute a second commencement date in this litigation, or that the Fifth Circuit's July 2, 2009 Opinion is in conflict with any other Federal Circuit. The Petition should be denied.

A. The non-retroactivity of CAFA makes this a case of limited precedential value.

Section 9 of CAFA specifies that "this Act shall apply to any civil action commenced on or after the date of enactment of this Act."[7] In drafting the statute, Congress specifically rejected a proposal to authorize removal for an action "certified" as a class

[7] Pub.L. 109-2, § 9, 119 Stat. 14. CAFA was enacted on February 18, 2005.

action after the date of enactment.[8] Thus, Congress purposefully did not make CAFA applicable to civil actions in which a motion for class certification is filed after enactment of the statute, such as the instant case. CAFA is only applicable to civil actions commenced on or after February 18, 2005.[9]

Cases that were originally filed pre-CAFA and converted to class actions post-CAFA are exceedingly rare as it is, and are becoming more so as CAFA ages. A Supreme Court decision regarding CAFA jurisdiction in this case would have *de minimus* precedential value, given that it would apply only to lawsuits filed as direct actions in state court prior to February 2005 that were converted to class actions after February 2005.

Federal courts have uniformly held that state law determines the date on which a lawsuit initially filed in state court is "commenced" under CAFA.[10]

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[8] *Compare* H.R. 516, 109th Cong. § 7 (2005) (providing, in the original House bill, for removal in cases where a class certification order is entered after CAFA's enactment date), *with* Class Action Fairness Act of 2005, Pub.L. 109-2, § 9, 119 Stat. 14 (containing no such language).

[9] Given the Fifth Circuit's statutory construction of CAFA that "[a] 'civil action' may commence before it becomes a 'class action'," the addition of class allegations alone does not commence a new civil action for the purposes of CAFA. Petition Appendix ("Petition App.") at 11a-12a.

[10] Petition App. at 10a; *Braud v. Transp. Serv. Co. of Ill.*, 445 F.3d 801, 803-04 (5th Cir. 2006); *see also, Plubell v. Merck & Co.*, 434 F.3d 1070, 1071 (8th Cir. 2006); *Pritchett v. Office*

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Under Louisiana law, a suit is commenced by filing a pleading presenting a demand to a court of competent jurisdiction.[11] This case was filed in state court on December 11, 1991, thirteen years before the enactment of CAFA. As recognized by the Circuit Courts, certain exceptions exist where federal courts have determined that a second commencement has taken place for the purposes of CAFA, namely, the addition of new defendants and the addition of certain new claims.[12] Here, Petitioners argue that the conversion of the instant action from a consolidated direct action to a class action gives rise to a new statutory claim for attorneys' fees pursuant to La. CCP article 595. The District Court and the Fifth Circuit correctly found that this case should be remanded because the amendment at issue did not dramatically change the character of the litigation such that the case should be deemed to have commenced anew.

B. La. CCP article 595(A) does not present an issue that should be decided by the United States Supreme Court.

The Petitioners' questions presented are classic examples of begging the question. Petitioners offer a

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Depot, Inc., 420 F.3d 1090, 1094 (10th Cir. 2005); *Knudsen v. Liberty Mut. Ins. Co.*, 411 F.3d 805, 806 (7th Cir. 2005); *Natale v. Pfizer, Inc.*, 424 F.3d 43, 44 (1st Cir. 2005); *Bush v. Cheaptickets, Inc.*, 425 F.3d 683, 684, 686-87 (9th Cir. 2005).

[11] La. CCP article 421.

[12] *See* cases cited *infra* at note 32.

discredited proposition claiming a new state statutory authority for attorneys' fees disguised as an argument about CAFA's commencement date. Petitioners' claim that CAFA confers jurisdiction in this case is premised on the assumption that La. CCP article 595(A) creates a new substantive claim for attorneys' fees as part of a damage award in a Louisiana class action lawsuit. It clearly does not.[13] This High Court is not the forum to resolve this issue of state law that has no national or constitutional implications.

The pertinent language of article 595 is clear: "The court may allow the representative parties their reasonable expenses of litigation, including attorneys' fees, when as a result of the class action a fund is made available, or a recovery or compromise is had which is beneficial, to the class."[14] Petitioners argue that "Louisiana law gives courts the power to award attorneys' fees and costs by statute," referencing article 595.[15] However, the unambiguous language of the statute belies this argument. As explained by Magistrate Judge Riedlinger in his report recommending remand of this case, "The eligible sources of the art. 595(A) fees are only the common fund or other benefits made available to the class by the class action, and [article 595(A)] 'does not authorize the

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[13] "A class action is a procedural device only and does not confer substantive rights." *Husband v. Tenet Healthsystems Mem'l Med. Ctr., Inc.*, 2009 WL 2480082, at *5 (La. App. 4th Cir. 2009).

[14] La. CCP article 595(A).

[15] Petition at 7.

court to assess attorney's fees to the class action defendant'."[16] The legislative history of La. CCP article 595(A) supports Judge Riedlinger's conclusion. La. CCP article 595 is modeled on Federal Rule of Civil Procedure ("FRCP") 23 which does not create a substantive right for class action plaintiffs to recover attorneys' fees from defendants.[17]

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[16] Petition App. at 50a, *citing Grant v. Chevron Phillips Chem. Co., L.P.*, 309 F.3d 864 (5th Cir. 2002); *see also Harrison, et al. v. Union Carbide Corp., et al.*, 1995 WL 555616, at *2 (E.D. La. 1995) ("[La. CCP article 595] does not compel the defendants to pay any attorney's fees over and above the amount of damages awards").

[17] *Wright, Miller and Cooper,* Federal Practice and Procedure Civil 3d § 1803; *see Brooks v. Union Pac. R.R. Co., et al.*, 13 So.3d 546, 555 (La. 2009) (La. CCP articles 591-597 were adopted from FRCP 23); *see also Robichaux v. State Dep't of Health and Hosps.*, 952 So.2d 27, 33 n.7 (La. App. 1st Cir. 2006) (In 1997, the Louisiana legislature revised Louisiana's class action provisions to track the language of FRCP 23). Although the 1997 amendments were declared non-retroactive, the language of La. CCP article 595 was not changed by those amendments; therefore, the issue of retroactivity of the amendments is irrelevant to the application of La. CCP article 595. La. CCP article 595 (1991); La. CCP article 595 (1998); La. CCP article 595 (2008); La. CCP article 595 historical and statutory notes (1998) ("Pursuant to the statutory revision authority of the Louisiana State Law Institute, in 1997, the paragraphs of this article were designated as pars. A and B"; therefore, the only change to La. CCP article 595 by the 1997 amendments was to specifically designate the paragraphs of this article); La. CCP article 595 historical and statutory notes (2008) (This note is identical to the historical and statutory note to La. CCP article 595 (1998) indicating no subsequent revisions were made to this article).

In *Grant v. Chevron Phillips Chemical Company*, the Fifth Circuit, in determining that attorneys' fees pursuant to article 595(A) can be included in calculating the amount in controversy for federal diversity jurisdiction, analyzed article 595 as merely a fee shifting statute.[18] In an opinion authored by Judge Wiener, the Fifth Circuit explained that "the shifting is not between the class and the defendant. Instead, the shifting is between the class representatives and the rank and file members of the class."[19] On the particular issue presented in the instant case, Judge Wiener, in *Grant*, notes, "The question whether the court can assess attorney's fees to the class action defendant on the strength of art. 595(A) alone need not be answered for our purposes today, so we leave it to another day, preferably to a Louisiana court."[20] Thus, as recognized by the Fifth Circuit, the issue currently before the Court hinges on an interpretation of state law that should be made by a Louisiana state court.

Petitioners erroneously cite to *Grant* as the basis for their argument that "[i]f Louisiana statutory attorneys' fees under article 595 can be used for calculation of the amount in controversy, then it stands that such fees must be considered a new claim which would open a removal window for purposes of CAFA

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[18] *Grant*, 309 F.3d at 872, 876.

[19] *Id.* at 872.

[20] *Id.* at 872 n.27.

jurisdiction."[21] In the *sub judice*, Judge Wiener refused to make the unfounded leap in reasoning requested by Petitioners and found that this case does not fall within the jurisdiction of CAFA regardless of the outcome of the article 595 issue.[22] There is no reason for this Court to further entertain the issue.

The Eastern District of Louisiana has found:

> La. C. Civ. Proc. 595 allows the court to designate a certain amount of a specific fund to be awarded as attorney's fees and does not compel the defendants to pay anything over and above the amount of compensatory damages awarded. Louisiana's class action law does not require the defendant to pay one dime in attorneys' fees, it merely gives the trial court the power to designate how much of the final pie the named plaintiffs' attorneys shall receive as fees.[23]

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[21] Petition at 9.

[22] In *Grant*, the Fifth Circuit determined that "[t]he way that art. 595(A) harmonizes Louisiana's attorneys' fees rules in the context of class actions is by empowering, without mandating, the court to 'allow' attorneys' fees to class representatives from funds or other sources of recovery made available to the class – whether by judgment, settlement, or otherwise – so long as such favorable result is the product of the class litigation," providing further support that article 595(A) does not create a new substantive claim for attorneys' fees. 309 F.3d at 874.

[23] *Cooper, et al. v. Koch Pipeline, Inc., et al.*, 1995 WL 931091, at *2 (E.D. La. 1995) (*abrogated on other grounds by Grant*, 309 F.3d 864).

Similarly, the Louisiana Fifth Circuit Court of Appeals has specifically found that "[a]rt. 595 does not increase the amount of the defendants' potential exposure; this occurs when attorneys' fees are a statutory or contractual element of damages awarded *in addition* to the plaintiff's recovery of actual damages."[24] The Louisiana Supreme Court, however, has not definitively weighed in on the issue. In the absence of definitive authority from Louisiana's highest court interpreting La. CCP article 595, there is no compelling reason for this Honorable Court to revisit the lower courts' conclusion that the Respondents' amendment did not "expose the defendants to a new or additional kind of damages, nor [did] it significantly change the substantive character of the litigation."[25]

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[24] *In re Gas Water Heater Prods. Liab. Litig.*, 697 So.2d 341, 346 (La. App. 5th Cir. 1997) (*overturned on other grounds*, 711 So.2d 264 (La. 1998)) ("LSA-C.C.P. art. 595 is *discretionary*; it does not require the court to award attorneys' fees, nor does it make attorneys' fees a statutory or legal element of damages in a class action when the underlying cause of action does not otherwise provide for attorneys' fees as a statutory element of damages. This article does not create an element of damages for attorneys' fees; rather, art. 595 provides a vehicle whereby the trial court, at its discretion, *may* award the reasonable costs of litigation, including attorneys' fees, to the class representatives when as a result of the class action a fund is made available").

[25] Petition App. at 53a.

C. There is no confusion or conflict among the circuits.

Petitioner contends that "[t]he employment of state law relation-back tests to determine when a civil action was 'commenced' for CAFA removal purposes has caused confusion in district and appellate courts."[26] There is no confusion or conflict among the Circuit Courts in the determination of the commencement date of a lawsuit filed before the enactment of CAFA. In the instant case the Fifth Circuit, consistent with the other Circuit Courts, found that "the date on which a civil action commences is determined by state law."[27] Looking to state law to determine commencement is appropriate considering that in every case where this issue arises, the proceeding will have been initially filed in state court.

Federal courts have also been asked to determine whether post-CAFA amendments to a lawsuit commenced pre-CAFA have so dramatically changed the character of the litigation that the case is commenced anew. In determining whether an amendment re-commences a suit, some federal courts have considered whether the amendment relates back to the original complaint under state law.[28] Petitioner

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[26] Petition at 4.

[27] Petition App. at 12a; *see* cases cited *supra* at note 10.

[28] *Id.* at 22a; *Braud*, 445 F.3d at 806-07; *Hall v. State Farm Mut. Auto. Ins. Co.*, 215 Fed.Appx. 423, 425, 427-28 (6th Cir. 2007); *Plubell*, 434 F.3d at 1071-72; *Prime Care of Northeast Kan., LLC v. Humana Ins. Co.*, 447 F.3d 1284, 1286 (10th Cir.

(Continued on following page)

contends that this use of state relation-back analysis produces disparate results.[29]

In this instant case, the Fifth Circuit found relation-back analysis "unilluminating"[30] and chose not to rely on it in its affirmation of the District Court's remand order:

> Thus, whether we apply the Louisiana or the federal relation-back analysis to Abshire et al.'s ninth amended complaint, we are convinced that they obviously have not commenced a new 'civil action.' Likewise, when we apply our current default rule under Louisiana law, we are convinced that the ninth amended complaint does not commence a new civil action.[31]

2006); *Santamarina, et al. v. Sears, Roebuck, & Co.*, 466 F.3d 570, 573 (7th Cir. 2006); *Knudsen*, 411 F.3d at 807; *see also Bush*, 425 F.3d at 687.

[29] The Petitioner provides no alternative test under which federal jurisdiction would apply in this case under CAFA. To the extent that Petitioner attacks the federal courts' employment of "state law relation-back" analysis as producing disparate results, it should be noted that the federal relation-back analysis expressly incorporates state law analysis. FRCP 15(c)(1)(A) specifically requires the use of state relation-back law in state law cases to determine when an amendment relates back to the date of the original pleading. Petitioner is essentially asking this Court to reject an effective, widely used rule of law for an undisclosed alternative.

[30] Petition at 5; Petition App. at 18a.

[31] Petition App. at 23a.

The Fifth Circuit did not blindly apply state law relation-back analysis to determine whether the post-CAFA amendment re-commenced the case, as the Petitioner suggests. Quite to the contrary, the Fifth Circuit analyzed the rulings of the other Circuit Courts to ensure that the result in this case was consistent with the developing body of federal jurisprudence on the re-commencement issue – and it is.[32] The Fifth Circuit did not "flatly reject" a relation-back test, as alleged by Petitioners;[33] it merely applied it in the alterative in an effort to preserve uniformity within the Federal Circuit Courts and illustrate the impossibility of CAFA jurisdiction in the instant case under any analysis.[34]

Determination of a second commencement date for removal under CAFA is not contingent on relation-back analysis alone. The issue is whether a new claim was made by the post-CAFA amendment and, if so, whether that new claim was a sufficiently dramatic change to the character of the litigation to cause the

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[32] *Braud*, 445 F.3d at 804 (addition of a new defendant "commences" civil action as to that defendant); *Knudsen v. Liberty Mut. Ins. Co.*, 435 F.3d 755, 758 (7th Cir. 2006) (a novel claim expanding the original claim to include all policies issued nationwide by any of the defendant's subsidiaries or affiliates commences new litigation under CAFA); *Plummer v. Farmers Group, Inc.*, 388 F.Supp.2d 1310, 1313, 1316-17 (E.D. Okla. 2005) (addition of thousands of new plaintiffs and two new causes of action constituted *de facto* commencement of new suit).

[33] Petition at 5.

[34] Petition App. at 21a, 23a.

case to have a second commencement date. If no new claim was made under Louisiana law, then there is no need to determine whether a new commencement date occurred.[35] The lower courts correctly found that the Respondents' amendment did not assert a new claim regardless of the interpretation of La. CCP article 595 and remanded the case. Under the analysis employed by all other Circuit Courts that have weighed in on the issue, the result in this case would be the same. There is no compelling reason for this Court to expend its time and effort to attempt to answer an irrelevant question when no confusion or conflicts exist among the Circuits.

D. Answering Petitioners' questions will not affect the outcome of this case.

Even if this Court decides article 595 creates a new state law claim for attorneys' fees as an additional damage claim in Louisiana and that consideration of relation-back tests is inappropriate in the context of determining CAFA commencement dates, federal jurisdiction under CAFA is specifically excluded in this case under two different and distinct mandatory statutory exceptions.[36] Both the State

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[35] In fact, the Fifth Circuit determined that "the concerns balanced by the relation-back doctrine are virtually non-existent in this case." *Id.* at 20a.

[36] These exceptions were not ruled on by any lower court because those courts found the lack of a new commencement date for removal dispositive. *See id.* at 23a; *see also id.* at 29a-30a

(Continued on following page)

Actor and Local Controversy exceptions are applicable in the instant case and both preclude federal jurisdiction under CAFA.

First, section 1332(d)(5)(A) states that CAFA shall not apply to any class action in which "the primary defendants are States, State officials, or other governmental entities." The Louisiana Department of Insurance and Office of Financial Institutions are the only primary defendants in the instant case; these state actors are the tortfeasors and have liability exposure for the full amount of Respondents' losses.[37] All of the remaining defendants are insurance companies who are merely contractual indemnitors. Their liability is wholly dependent on the liability of the primary defendants and limited by contractual obligations with the State of Louisiana. CAFA jurisdiction is not applicable in the instant case under the State Actor Exception.

Second, under section 1332(d)(4)(A) "[a] district court shall decline to exercise jurisdiction under paragraph (2)" where over two-thirds of the proposed class are from the state of the suit's origin, the

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(Judge Tyson's adoption of Magistrate Judge's Report in its entirety); *see also id.* at 31a-53a (Magistrate Judge Riedlinger found the commencement issue dispositive and did not analyze the statutory exceptions to CAFA).

[37] *See id.* at 38a, *citing Frazier v. Pioneer Arms, LLC*, 455 F.3d 542, 546 (5th Cir. 2006) (internal citations omitted) (primary defendants are those defendants who are the real targets of the lawsuit).

principal injuries occurred in that state, and at least one of the Petitioners' alleged conduct forms a significant basis for the claims asserted. More than two-thirds of the proposed plaintiff class members are citizens of Louisiana, this case was originally filed in Louisiana, and the conduct that gave rise to the claim occurred almost exclusively in Louisiana. The Local Controversy exception of CAFA also precludes federal jurisdiction in the instant case.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that the United States Supreme Court deny the Petition for a Writ of *Certiorari* in this case.

Respectfully submitted,

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Thursday, November 9, 2006

Richard P. Lemmler, Jr.
Ethics Advisory Service Committee
601 St. Charles Avenue
New Orleans, LA 70130-3404

RE: Request for Ethical Opinion in connection with Donald W. Abshire, et al. v. Department of Insurance, et al. No. 377,713 c/w 412,265, 19th J.D.C., East Baton Rouge Parish, LA

Dear Mr. Lemmler:

We write to request your assistance regarding an ethical delimma we are currently facing in connection with the above referenced suit. Below you will find a brief description of the case followed by our specific question to you.

In 1991, counsel brought suit against the Louisiana Department of Insurance and Office of Financial Institution on behalf of many individual plaintiffs for conduct that resulted in the loss of millions in life insurance policies, annuities, and corporate notes. The case is not a class action, but instead a consolidated matter which began with over 1,000 individual plaintiffs, and has been reduced over the years to approximately 500. Most individual claims are less than $10,000. In order to manage so many clients' claims, it was determined at the front end that some kind of smaller committee or board would be necessary, as a practical matter. It was initially thought that a committee of plaintiffs, selected by the plaintiffs themselves, should possess a power of attorney for each client's claim in order to make decisions for every client, including the power to settle and release all claims. This reflected the reality that it would otherwise be impossible ever to negotiate a settlement in the case if each settlement offer had to be communicated to and discussed with over a thousand different people. This initial "committee" concept evolved into creation of the PICO/Midwest Action Group, referred to as PMAG, which is a Louisiana not-for-profit corporation whose members, officers and directors are all plaintiffs. Each plaintiff is a member of PMAG, and this arrangement is embodied in each plaintiff's engagement letter with the attorneys.

The Board of Directors of PMAG is thus elected by the plaintiffs themselves to represent their interests. The Board obviously has a fiduciary duty to all their fellow plaintiffs who are members of PMAG. A power of attorney in favor of the PMAG Board, to manage each individual claim, is incorporated into each plaintiff's contract to employ attorneys. Since the inception of this case in 1991, the attorneys have reported directly to the PMAG Board of Directors and taken instructions from them, relying on the fact that all the individual plaintiffs had knowingly delegated their decision-making authority to the PMAG Board. No client has ever objected to this arrangement. The authority for the attorneys to engage in specific settlement negotiations is derived from PMAG corporate resolutions, as adopted by the Board after consultation with trial counsel. Illustrative copies of each such document are attached hereto in redacted format as Exhibit A. PMAG makes independent decisions based on the advice of trial counsel, and its officers and directors. Board members receive no compensation for their service, nor are they affiliated in any way with the attorneys.

After over 15 years of intense litigation, including numerous appellate battles in the First and Third Circuits, the prospect of settlement has arisen. In considering various settlement offers, a question has arisen regarding the continuing power of PMAG to settle and release claims on behalf of the individual plaintiffs. The question that arises is whether or not PMAG may utilize its powers of attorney to settle and

release the claims of the numerous grantors of the powers of attorney. Although this ability has obviously been granted on the face of the individually-executed powers of attorney, it has been suggested to counsel that Professional Rule of Conduct 1.8 (in particular, subsections *g* and *k*) – addressing representation of multiple clients and barring the use of a power of attorney by counsel in the litigation – could be read very broadly to make the use of the PMAG powers of attorney unethical, despite the fact that the attorneys themselves do not hold the powers of attorney. If the PMAG power of attorney is deemed inadequate for these purposes, counsel will be forced to obtain individual signatures and releases from hundreds of individual clients – all of whom have already expressly delegated that power to PMAG to avoid just such a logistical nightmare. In an abundance of caution, the attorneys seek clarification on whether they can continue to rely on the PMAG Board's use of these powers of attorney in providing settlement releases on behalf of the individual PMAG members, all of whom are clients of the attorneys seeking this guidance.

Question Presented: Is it ethical (a) for a client to give a power of attorney to settle and release his claims to a third party organization of which the client is a member, in order to efficiently manage his claim, and (b) for a lawyer to rely on such a power of attorney in negotiating a settlement, including the final release of those claims in settlement? Stated another way, in the circumstances described above, is

it necessary for a lawyer to obtain the individual authorization of each client to release their claims in settlement, in spite of the fact that the client has already delegated the power to release the claim by executing a power of attorney that specifically grants that power to a third party – who is not his attorney and is not controlled by his attorney?

We truly appreciate your assistance with this matter.

With kindest regards,

PERCY, SMITH & FOOTE, LLP

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_____

ELIZABETH ERNY FOOTE

Enclosure
DPS/EEF:jdc
418.005

[LOGO]

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December 18, 2006

Mr. David P. Smith
Ms. Elizabeth Erny Foote
Percy, Smith & Foote, LLP
720 Murray Street
P.O. Box 1632
Alexandria, LA 71309-1632

CONFIDENTIAL

Re: Ethics Advisory Opinion
EASC #: 06-047-3E

Dear Mr. Smith & Ms. Foote:

You have asked for our opinion regarding your professional responsibility under the following circumstances. Your written request states:

- In 1991, counsel brought suit against the Louisiana Department of Insurance and Office of Financial Institution on behalf of many individual plaintiffs for conduct that resulted in the loss of millions in life insurance policies, annuities, and corporate notes. The case is not a class action, but instead a consolidated matter which began with over 1,000 individual plaintiffs, and has been reduced over the years to approximately

500. Most individual claims are less than $10,000. In order to manage so many clients' claims, it was determined at the front end that some kind of smaller committee or board would be necessary, as a practical matter. It was initially thought that a committee of plaintiffs, selected by the plaintiffs themselves, should possess a power of attorney for each client's claim in order to make decisions for every client, including the power to settle and release all claims. This reflected the reality that it would otherwise be impossible ever to negotiate a settlement in the case if each settlement offer had to be communicated to and discussed with over a thousand different people. This initial "committee" concept evolved into creation of the PICO/Midwest Action Group, referred to as PMAG, which is a Louisiana not-for-profit corporation whose members, officers and directors are all plaintiffs. Each plaintiff is a member of PMAG, and this arrangement is embodied in each plaintiff's engagement letter with the attorneys.

- The Board of Directors of PMAG is thus elected by the plaintiffs themselves to represent their interests. The Board obviously has a fiduciary duty to all their fellow plaintiffs who are members of PMAG. A power of attorney in favor of the PMAG Board, to manage each individual claim, is incorporated into each plaintiff's contract to employ attorneys. Since the inception of this case in 1991, the attorneys have reported directly to the PMAG Board of Directors and taken instructions

from them, relying on the fact that all the individual plaintiffs had knowingly delegated their decision-making authority to the PMAG Board. No client has ever objected to this arrangement. The authority for the attorneys to engage in specific settlement negotiations is derived from PMAG corporate resolutions, as adopted by the Board after consultation with trial counsel. Illustrative copies of each such document are attached hereto in redacted format as Exhibit A (see enclosed copies for reference). PMAG makes independent decisions based on the advice of trial counsel, and its officers and directors. Board members receive no compensation for their service, nor are they affiliated in any way with the attorneys.

- After over 15 years of intense litigation, including numerous appellate battles in the First and Third Circuits, the prospect of settlement has arisen. In considering various settlement offers, a question has arisen regarding the continuing power of PMAG to settle and release claims on behalf of the individual plaintiffs. The question that arises is whether or not PMAG may utilize its powers of attorney to settle and release the claims of the numerous grantors of the powers of attorney. Although this ability has obviously been granted on the face of the individually-executed powers of attorney, it has been suggested to counsel that Professional Rule of Conduct 1.8 (in particular, subsections *g* and *k*) – addressing representation of multiple clients and barring the

use of a power of attorney by counsel in the litigation – could be read very broadly to make the use of the PMAG powers of attorney unethical, despite the fact that the attorneys themselves do not hold the powers of attorney. If the PMAG power of attorney is deemed inadequate for these purposes, counsel will be forced to obtain individual signatures and releases from hundreds of individual clients – all of whom have already expressly delegated that power to PMAG to avoid just such a logistical nightmare. In an abundance of caution, the attorneys seek clarification on whether they can continue to rely on the PMAG Board's use of these powers of attorney in providing settlement releases on behalf of the individual PMAG members, all of whom are clients of the attorneys seeking this guidance.

Your Query:

Is it ethical (a) for a client to give a power of attorney to settle and release his claims to a third party organization of which the client is a member, in order to efficiently manage his claims, and (b) for a lawyer to rely on such a power of attorney in negotiating a settlement, including the final release of those claims in settlement? Stated another way, in the circumstances described above, is it necessary for a lawyer to obtain the individual authorization of each client to release their claims in settlement, in spite of the fact that the client has already

delegated the power to release the claim by executing a power of attorney that specifically grants that power to a third party – who is not his attorney and is not controlled by his attorney?

Foremost, we would remind you that our purpose and policies do not permit us to provide advice or opinions on matters of substantive law outside the limited scope of legal ethics. As such, the following remarks will be limited to an analysis of your facts and advice to you regarding your proposed conduct as lawyers based almost entirely upon the Louisiana Rules of Professional Conduct – there is no intent to suggest or imply a substantive legal opinion with respect to the legality and/or viability of the power of PMAG to settle and release claims on behalf of the individual plaintiffs. Additionally, our policies limit our advice to your prospective conduct – we do not intend to suggest or imply an opinion regarding any conduct that may have already occurred or which may already be on-going.

In light of the foregoing, with respect to your specific questions "(a)" [" . . . *Is it ethical (a) for a client to give a power of attorney to settle and release his claims to a third party organization of which the client is a member, in order to efficiently manage his claims* . . . "], that question, as worded, appears to call for an opinion – perhaps even a substantive legal opinion – regarding the conduct of a client, rather than the conduct of a lawyer. Under that reading, we cannot respond to such a question.

With respect to your specific question "(b)" [" . . . *Is it ethical . . . (b) for a lawyer to rely on such a power of attorney (given by the client to a third party organization of which the client is a member in order to efficiently manage his claims) in negotiating a settlement, including the final release of those claims in settlement? . . .* "], we would offer the following:

As you have already noted, Rule 1.8(k) of the Louisiana Rules of Professional Conduct provides that:

> *. . . A lawyer shall not solicit or obtain a power of attorney or mandate from a client which would authorize the attorney, without first obtaining the client's informed consent to settle, to enter into a binding settlement agreement on the client's behalf or to execute on behalf of the client any settlement or release documents. An attorney may obtain a client's authorization to endorse and negotiate an instrument given in settlement of the client's claim, but only after the client has approved the settlement . . .*

The Rule is fairly clear that a lawyer may not obtain (and, therefore, a reasonable assumption would be that the lawyer may not use or act upon) a power of attorney that would permit a lawyer to enter into a binding settlement agreement and/or execute on behalf of the client any settlement or release documents regarding the client's claims without first obtaining the client's informed consent to settle. "Informed consent" is defined generally by Rule 1.0(c) as " *. . . the agreement by a person to a proposed course of*

conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." The client's "informed consent to settle", then, would be the client's agreement to a proposed settlement after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed settlement. In short, Rule 1.8(k) does not permit a lawyer to get advance written authority from a client to enter into a binding settlement agreement and/or execute on behalf of the client any settlement or release documents while skipping the need to obtain the client's informed consent to the actual settlement terms, risks and alternatives. While the rule does permit the lawyer to obtain authorization from the client to endorse and negotiate an instrument given in settlement of the client's claim, that authority is still conditioned upon first obtaining the client's informed consent to settle (" . . . *only after the client has approved the settlement* . . . ").

Rule 1.8(g) applies this same principal (i.e., that a lawyer cannot contractually avoid/by-pass the need to obtain a client's informed consent to settle at the time of actual settlement) to the situation where a lawyer might be faced with an aggregate settlement of claims while simultaneously representing more than one client with respect to their individual claims in the matter:

> *. . . A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client gives informed consent, in writing signed by the client, or a court approves a settlement in a certified class action. The lawyer's disclosure shall include the existence and nature of all claims or pleas involved and of the participation of each person in the settlement . . .*

In essence, a lawyer may not settle the potentially-competing claims of multiple clients simultaneously represented by the lawyer without getting the informed consent in writing, signed by each client involved, and that written informed consent must disclose the existence and nature of all claims involved and the participation of each person in the settlement. As already noted above, Rule 1.8(k) would preclude the lawyer from attempting in advance to obtain the clients' authority to enter into a binding settlement agreement and/or to execute any settlement or release documents regarding the clients' individual claims without first obtaining their informed consent to settle. Rule 1.8(g) recognizes the logistical difficulties that might be encountered by a lawyer simultaneously representing a large number of clients when faced with the prospect of obtaining informed consent to settle and, as a result, creates a limited special exception allowing the lawyer to obtain court

approval of an aggregate settlement of the clients' claims but only in a certified class action.

In conclusion – and to answer your final question – we believe the Louisiana Rules of Professional Conduct would obligate you to obtain the individual authorization of each client to release their respective claims in settlement, in spite of the fact that the client may have already attempted to delegate the power to release the claim by executing a power of attorney that specifically grants that power to a third party – who is not his attorney and is not controlled by his attorney. We believe Rule 1.8(k) and Rule 1.8(g) would not allow you to get advance authority from a client permitting you alone, as lawyer, to enter into a binding settlement agreement and/or to execute any settlement or release documents regarding the client's individual claims without first obtaining the client's informed consent to settle. As you simultaneously represent approximately five hundred individual claimants and this is not a certified class action, we believe Rule 1.8(g) would obligate you to obtain the informed consent to settle from each client, in a writing signed by the client, where that written consent would contain disclosures including the existence and nature of all claims involved and of the participation of each person in the settlement. As additional support of this view, we also enclose a copy of a recent opinion issued by the ABA on this topic – ABA Formal Opinion 06-438.

The Ethics Advisory Service provides this response to your inquiry subject to our Statement of Purpose and Policy.

Sincerely,

/s/ Richard P. Lemmler, Jr.
Richard P. Lemmler, Jr.
Ethics Counsel
For the Committee

RPLJr/dcl
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Thursday, August 2, 2007

VIA Facsimile and U.S. Mail

Honorable Kay Bates
222 St. Louis Street
776 Governmental Building
Baton Rouge, LA 70802

RE: *Donald W. Abshire, el al. v. Department of Insurance, et al.*
No. 377,713 c/w 412,265; 19th J.D.C., State of Louisiana

Dear Judge Bates:

I am writing on behalf of all counsel for the Plaintiffs in the referenced case. We have heard that the Court is considering a *sua sponte* continuance of the September trial in this matter to allow additional time for the parties to discuss settlement. While we

feel that an imminent trial date is a critical motivation for settlement discussion, additional time alone will not promote this goal without action from the court to resolve the authority/representation issues that have heretofore impeded amicable resolution.

For more than a year, Plaintiffs have been diligently working to resolve issues that have hampered the parties' ability to conduct meaningful settlement discussions and/or mediation. These efforts have led us to the conclusion that class certification is the *only recognized process* that will: (1) prevent a large number of Plaintiffs from being unrepresented in this matter; (2) allow Plaintiffs' counsel to speak with one authorized voice in settlement discussions; (3) allow for the possibility of final resolution of all claims; (4) allow the Defendants to secure adequate releases for all Plaintiffs in the event of settlement; and (5) avoid taxing judicial resources with an unnecessary (and legally unfounded) open court "polling" of the Plaintiffs.

This conclusion is confirmed by an opinion from the Louisiana State Bar Association Ethics Advisory Service Committee, which states in pertinent part: "Rule 1.8(g) recognizes the logistical difficulties that might be encountered by a lawyer simultaneously representing a large number of clients when faced with the prospect of obtaining informed consent to settle and, as a result, creates a limited special exception allowing the lawyer to obtain court approval of an aggregate settlement of the clients' claims <u>but only in a certified class action</u>."

As the Court is aware, late last year we were informed that the powers of attorney executed by the Plaintiffs in favor of the PMAG Board of Directors, which we had anticipated would allow for full and complete resolution, could no longer be relied on for that purpose. In the process of firming up the communication path needed to facilitate settlement discussions and trial preparations on an individual basis for over 500 clients, it became clear that we lacked adequate communication to conduct settlement discussions, or prepare for trial, for many of our clients. As it stands, we cannot entertain settlement offers unless we have specific authority from each client. As a result, we were compelled by the rules of professional conduct to move to withdraw as counsel for many of the Plaintiffs, and there is a motion to withdraw as counsel of record pending with the court. If the motion to withdraw is denied – as some Defendants prefer – and a class is not certified – as some Defendants will promote – Plaintiffs' counsel still will not be able to obtain the consent needed to conduct settlement discussions for those identified Plaintiffs. *In that case, a full trial on the merits will remain the only avenue to resolution and any continuance of the current trial date will be a fruitless act.*

Counsel for the Plaintiffs fully appreciates that Your Honor does not want to have hundreds of unrepresented parties in this matter. Like the Defendants, we have considered every conceivable option to cure the problems time has created. After a far reaching search it appears clear that class

certification is the only process set out in the Code of Civil Procedure to deal with the novel issues before this Court.

Some Defendants have suggested that the court order the Plaintiffs into court to "demonstrate" their willingness to proceed, in default of which their claims would be dismissed. Setting aside for now the fact that there is no statutory justification for such an order and that the process envisioned by the Defendants conflicts with the recent ruling of the First Circuit, as a practical matter, this "solution" solves nothing. Plaintiffs counsel will still be unable to meaningfully participate in settlement discussions if we have to communicate every offer (and obtain authorization for every counter offer) to hundreds of people. And the Defendants will remain hesitant to engage in meaningful settlement discussions while the ultimate fate of those Plaintiffs dismissed for failing to "check-in" works through the appellate system. In short, we have seen over the last year that anything short of class certification is fraught with delay and complexity that only serves to make settlement discussion a tool for delay.

Another option discussed would be to grant Plaintiffs counsel's motion to withdraw and appoint a curator to represent the unrepresented parties. Plaintiffs are open to discussing this option. But like the roll call approach above, we find no specific legal authority to support this option and it would not resolve the logistical difficulties in negotiating settlement. We strongly believe the class approach is the

only viable way to achieve the Court's objectives of efficient case management within the confines of the Code of Civil Procedure.

We bring these items to the Court's attention in order to make the August 6, 2007 status conference meaningful. We appreciate your attention to this matter and look forward to discussing the options available at the status conference on Monday.

Respectfully,

PERCY, SMITH & FOOTE, LLP

/s/ David C. Raphael, Jr.
DAVID C. RAPHAEL, JR.

DCR/ap

cc: All Counsel of Record (See attached list)

DEFENDANTS' UNSUCCESSFUL ATTEMPTS TO SEEK STATE APPELLATE REVIEW OR FEDERAL FORUM
DEFENDANTS' FEDERAL REMOVAL ATTEMPTS
09-08-2001 Removal to USDC, Middle Dist. La. 01-cv-00781 **11-20-2001** USDC, Middle Dist. La. remands matter to State court
06-20-2008 Removal to USDC, Middle Dist. La. 08-cv-00369 **12-30-2008** USDC, Middle Dist. La. remands matter to State Court **01-15-2009** Defendants file appeal with USCA, 5th Circuit 09-30121 **07-02-2009** USCA, 5th Circuit affirms the District Court's remand to State Court

(continued on next page)

DEFENDANTS' FAILED STATE WRIT APPLICATIONS

FILED BY DEPT. OF INS. ("DOI") & OFFICE OF FINAN. INSTITUTIONS ("OFI")

11-22-2000 La. 1st Cir., 2000-CW-2693
06-01-2001 La. Sup. Ct., 2001-CC-1586

FILED BY DOI

05-09-2001 La. 1st Cir., 2001-CW-0958

FILED BY DOI & OFI

07-03-2001 La. 1st Cir., 2001-CW-1525

FILED BY DOI & OFI

06-18-2003 La. 1st Cir., 2003-CW-1248

FILED BY ADMIRAL INS. CO.

05-05-2004 La. 1st Cir., 2004-CW-1002
10-27-2004 La. Sup. Ct., 2004-CC-2659

FILED BY DOI & OFFICE OF RISK MGMT. SELF INS. FUND

05-05-2004 La. 1st Cir., 2004-CW-1005
10-27-2004 La. Sup. Ct., 2004-CC-2672

FILED BY OFI

05-18-2004 La. 1st Cir., 2004-CW-1103
10-27-2004 La. Sup. Ct., 2004-CC-2656

FILED BY NATIONAL UNION FIRE INS. CO. OF PITTSBURGH, PA

05-19-2004 La. 1st Cir., 2004-CW-1122
10-27-2004 La. Sup. Ct., 2004-CC-2658

FILED BY LEXINGTON INS. CO.

05-19-2004 La. 1st Cir., 2004-CW-1124
10-27-2004 La. Sup. Ct., 2004-CC-2657

FILED BY WESTCHESTER FIRE INS. CO.

05-19-2004 La. 1st Cir., 2004-CW-1171
10-27-2004 La. Sup. Ct., 2004-CC-2670

FILED BY AM. EXCESS INS. ASSN.

05-19-2004 La. 1st Cir., 2004-CW-1132
10-26-2004 La. Sup. Ct., 2004-CC-2650

FILED BY DOI

03-30-2005 La. 1st Cir., 2005-CW-0626
03-30-2005 La. 1st Cir., 2005-CW-0627
07-15-2005 La. Sup. Ct., 2005-CC-1903
07-15-2005 La. Sup. Ct., 2005-CC-1894

FILED BY OFI

05-31-2005 La. 1st Cir., 2005-CW-1131

FILED BY ADMIRAL INS. CO.

04-16-2008 La. 1st Cir., 2008-CW-0751

ABSHIRE VS. STATE OF LOUISIANA

NO.: 09-30121

U.S. COURT OF APPEALS, 5TH CIRCUIT
RECORDING OF ORAL ARGUMENT
AS PROVIDED BY U.S. 5TH CIRCUIT
COURT OF APPEALS
At http://www.
ca5.uscourts.gov/OralArgumentRecordings.aspx

04/28/09

* *

The following typewritten matter was transcribed by
Gia Mangiaracina, Certified Court Reporter.

* *

M & S COURT REPORTERS
318-443-8759

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EXHIBITS:..... NONE

* * *

[40] JUDGE: Let me ask you a question.

MR. DUNLAP: Yes, sir.

JUDGE: What's the principal thrust of the state wanting to be in federal court?

MR. DUNLAP: [41] That's a good question, Your Honor.

JUDGE: I ask you that question because we've had a number of CAFA cases filed in our court that are post-Katrina related claims, starting with Preston Weems, and also –

MR. DUNLAP: Allstate. AAA.

JUDGE: – Allstate, I mean, several of them I've had the whatever fortune of having to wrestle with a number of these. And at least two of them in which the plaintiffs sought to invoke CAFA and the state, represented by the Attorney General, invoked sovereign immunity. And the notion of the claims being brought under params padre that to writ to stay in state court.

So, I'm not suggesting that one has to have a consistent litigation strategy, you know, across the board. But at least does strike me that in many of the post-Katrina cases at least the state has had a fairly consistent position to want to be in state court to litigate the road home post-Katrina insurance cases, they inserted antitrust as things by the new attorney general in a variety of claims. So, it's not [42] an inappropriate question, I just want to know. I mean, is there –

MR. DUNLAP: Yes, sir.

JUDGE: – something unique about this set of claims, putting aside the merit of them, that warrant being in federal court versus being in state court

where the state seems to want sort of a consistent theme with the cases.

MR. DUNLAP: Well, the consistent theme for the attorney general, is that, that he wants to be in a forum that is in the best interest of the citizens of Louisiana. And he has the authority to determine which forum is in the best interest of the citizens of Louisiana.

We want to be in federal court, because over the years of this litigation the state courts at every level, supreme, first circuit and district court, have refused to apply the res judicata effect of state versus public investors.

I stood in this court in 1994 and argued before Judge Wisdom in that case representing the Department of Insurance under the same transaction and occurrences that form the basis of this lawsuit. We [43] have urged res judicata and collateral estoppel at every turn and we're told that it's not applicable.

We filed an all writs action in the Middle District – I'm sorry, in the Western District of Louisiana asking the court to enforce the judgment of the State versus Gust against these plaintiffs who had claims in both litigation, and won that case. And, that's part of the record. That was a action brought under the re-litigation exception to the anti-injunction statute.

We want to be in federal court so that a federal tribunal, a federal judge will apply the State versus Gust holding to the facts of this case. Judge Bates,

the State District Judges refused to, and on every writ application for every amended petition that they filed we've asked the state courts to apply federal concepts of res judicata which they have refused.

Judge Drell in Alexandria did so and enjoined a good hunk of these plaintiffs from pursing certain of their claims which were at issue in that – in the State versus Public Investors Litigation. So, that's –

JUDGE: Excuse me. So, you want the federal court to give you some state-court relief that the state courts [44] won't give you?

MR. DUNLAP: That's exactly right, Your Honor. And Judge Bates has consistently signaled to these plaintiffs that she's going to certify this class, and that's why we're here.

JUDGE: This reminds of some days in distant past which I shall not allude to further of what they were.

JUDGE: Thank you, Mr. Dunlap. And Mr. Latham.

* * *

[48] CERTIFICATE

STATE OF LOUISIANA

PARISH OF RAPIDES

I, Gia Mangiaracina, Certified Court Reporter did not record, but only transcribed to the best of my ability the foregoing 47 pages of the Oral Argument.

I FURTHER CERTIFY that I am not related to any of the parties in this suit, am not of counsel for any of them, and have no financial interest in the outcome hereof.

IN WITNESS WHEREOF, I have hereunto affixed my signature at Alexandria, Louisiana, this 19th day of October, 2009.

/s/ Gia Mangiaracina
Gia Mangiaracino, CCR, #94081

[SEAL]

28 U.S.C.A. § 1332

United States Code Annotated Currentness
Title 28. Judiciary and Judicial Procedure (Refs & Annos)
Part IV. Jurisdiction and Venue (Refs & Annos)
Chapter 85. District Courts; Jurisdiction (Refs & Annos)

§ 1332. Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between –

(1) citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

For the purposes of this section, section 1335, and section 1441, an alien admitted to the United States for permanent residence shall be deemed a citizen of the State in which such alien is domiciled.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $75,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) For the purposes of this section and section 1441 of this title –

(1) a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business, except that in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business; and

(2) the legal representative of the estate of a decedent shall be deemed to be a citizen only of the same State as the decedent, and the legal representative of an infant or incompetent shall be deemed to be a citizen only of the same State as the infant or incompetent.

(d)(1) In this subsection –

(A) the term "class" means all of the class members in a class action;

(B) the term "class action" means any civil action filed under rule 23 of the Federal Rules of Civil Procedure or similar State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action;

(C) the term "class certification order" means an order issued by a court approving the treatment of some or all aspects of a civil action as a class action; and

(D) the term "class members" means the persons (named or unnamed) who fall within the definition of the proposed or certified class in a class action.

(2) The district courts shall have original jurisdiction of any civil action in which the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs, and is a class action in which –

(A) any member of a class of plaintiffs is a citizen of a State different from any defendant;

(B) any member of a class of plaintiffs is a foreign state or a citizen or subject of a foreign state and any defendant is a citizen of a State; or

(C) any member of a class of plaintiffs is a citizen of a State and any defendant is a foreign state or a citizen or subject of a foreign state.

(3) A district court may, in the interests of justice and looking at the totality of the circumstances, decline to exercise jurisdiction under paragraph (2) over a class action in which greater than one-third but less than two-thirds of the members of all proposed plaintiff classes in the aggregate and the primary defendants are citizens of the State in which the action was originally filed based on consideration of –

(A) whether the claims asserted involve matters of national or interstate interest;

(B) whether the claims asserted will be governed by laws of the State in which the action was originally filed or by the laws of other States;

(C) whether the class action has been pleaded in a manner that seeks to avoid Federal jurisdiction;

(D) whether the action was brought in a forum with a distinct nexus with the class members, the alleged harm, or the defendants;

(E) whether the number of citizens of the State in which the action was originally filed in all proposed plaintiff classes in the aggregate is substantially larger than the number of citizens from any other State, and the citizenship of the other members of the proposed class is dispersed among a substantial number of States; and

(F) whether, during the 3-year period preceding the filing of that class action, 1 or more other class actions asserting the same or similar claims on behalf of the same or other persons have been filed.

(4) A district court shall decline to exercise jurisdiction under paragraph (2) –

(A)(i) over a class action in which –

(I) greater than two-thirds of the members of all proposed plaintiff classes in the aggregate are citizens of the State in which the action was originally filed;

(II) at least 1 defendant is a defendant –

(aa) from whom significant relief is sought by members of the plaintiff class;

(bb) whose alleged conduct forms a significant basis for the claims asserted by the proposed plaintiff class; and

(cc) who is a citizen of the State in which the action was originally filed; and

(III) principal injuries resulting from the alleged conduct or any related conduct of each defendant were incurred in the State in which the action was originally filed; and

(ii) during the 3-year period preceding the filing of that class action, no other class action has been filed asserting the same or similar factual allegations against any of the defendants on behalf of the same or other persons; or

(B) two-thirds or more of the members of all proposed plaintiff classes in the aggregate, and the

primary defendants, are citizens of the State in which the action was originally filed.

(5) Paragraphs (2) through (4) shall not apply to any class action in which –

(A) the primary defendants are States, State officials, or other governmental entities against whom the district court may be foreclosed from ordering relief; or

(B) the number of members of all proposed plaintiff classes in the aggregate is less than 100.

(6) In any class action, the claims of the individual class members shall be aggregated to determine whether the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs.

(7) Citizenship of the members of the proposed plaintiff classes shall be determined for purposes of paragraphs (2) through (6) as of the date of filing of the complaint or amended complaint, or, if the case stated by the initial pleading is not subject to Federal jurisdiction, as of the date of service by plaintiffs of an amended pleading, motion, or other paper, indicating the existence of Federal jurisdiction.

(8) This subsection shall apply to any class action before or after the entry of a class certification order by the court with respect to that action.

(9) Paragraph (2) shall not apply to any class action that solely involves a claim –

(A) concerning a covered security as defined under 16(f)(3)[1] of the Securities Act of 1933 (15 U.S.C. 78p(f)(3)[2] and section 28(f)(5)(E) of the Securities Exchange Act of 1934 (15 U.S.C. 78bb(f)(5)(E));

(B) that relates to the internal affairs or governance of a corporation or other form of business enterprise and that arises under or by virtue of the laws of the State in which such corporation or business enterprise is incorporated or organized; or

(C) that relates to the rights, duties (including fiduciary duties), and obligations relating to or created by or pursuant to any security (as defined under section 2(a)(1) of the Securities Act of 1933 (15 U.S.C. 77b(a)(1)) and the regulations issued thereunder).

(10) For purposes of this subsection and section 1453, an unincorporated association shall be deemed to be a citizen of the State where it has its principal place of business and the State under whose laws it is organized.

(11)(A) For purposes of this subsection and section 1453, a mass action shall be deemed to be a class action removable under paragraphs (2) through (10) if it otherwise meets the provisions of those paragraphs.

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[1] So in original. Reference to "16(f)(3)" probably should be preceded by "section".

[2] So in original. Probably should be "77p(f)(3)".

(B)(i) As used in subparagraph (A), the term "mass action" means any civil action (except a civil action within the scope of section 1711(2)) in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact, except that jurisdiction shall exist only over those plaintiffs whose claims in a mass action satisfy the jurisdictional amount requirements under subsection (a).

(ii) As used in subparagraph (A), the term "mass action" shall not include any civil action in which –

(I) all of the claims in the action arise from an event or occurrence in the State in which the action was filed, and that allegedly resulted in injuries in that State or in States contiguous to that State;

(II) the claims are joined upon motion of a defendant;

(III) all of the claims in the action are asserted on behalf of the general public (and not on behalf of individual claimants or members of a purported class) pursuant to a State statute specifically authorizing such action; or

(IV) the claims have been consolidated or coordinated solely for pretrial proceedings.

(C)(i) Any action(s) removed to Federal court pursuant to this subsection shall not thereafter be

transferred to any other court pursuant to section 1407, or the rules promulgated thereunder, unless a majority of the plaintiffs in the action request transfer pursuant to section 1407.

(ii) This subparagraph will not apply –

(I) to cases certified pursuant to rule 23 of the Federal Rules of Civil Procedure; or

(II) if plaintiffs propose that the action proceed as a class action pursuant to rule 23 of the Federal Rules of Civil Procedure.

(D) The limitations periods on any claims asserted in a mass action that is removed to Federal court pursuant to this subsection shall be deemed tolled during the period that the action is pending in Federal court.

(e) The word "States", as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico.

Pub. L. 109-2, 2005, 119 Stat. 4

SEC. 9. EFFECTIVE DATE

The amendments made by this Act shall apply to any civil action commenced on or after the date of enactment of this Act.

Approved February 18, 2005.

PL 109-2, 2005 S 5

Federal Rule of Civil Procedure

Rule 15. Amended and Supplemental Pleadings

[Text of subdivision (a) effective until December 1, 2009, absent contrary Congressional action.]

(a) Amendments Before Trial.

(1) *Amending as a Matter of Course.* A party may amend its pleading once as a matter of course:

(A) before being served with a responsive pleading; or

(B) within 20 days after serving the pleading if a responsive pleading is not allowed and the action is not yet on the trial calendar.

(2) *Other Amendments.* In all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires.

(3) *Time to Respond.* Unless the court orders otherwise, any required response to an amended pleading must be made within the time remaining to respond to the original pleading or within 10 days after service of the amended pleading, whichever is later.

[Text of subdivision (a) effective December 1, 2009, absent contrary Congressional action.]

(a) Amendments Before Trial.

(1) ***Amending as a Matter of Course.*** A party may amend its pleading once as a matter of course within:

(A) 21 days after serving it, or

(B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier.

(2) ***Other Amendments.*** In all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires.

(3) ***Time to Respond.*** Unless the court orders otherwise, any required response to an amended pleading must be made within the time remaining to respond to the original pleading or within 14 days after service of the amended pleading, whichever is later.

(b) Amendments During and After Trial.

(1) ***Based on an Objection at Trial.*** If, at trial, a party objects that evidence is not within the issues raised in the pleadings, the court may permit the pleadings to be amended. The court should freely permit an amendment when doing so will aid in

presenting the merits and the objecting party fails to satisfy the court that the evidence would prejudice that party's action or defense on the merits. The court may grant a continuance to enable the objecting party to meet the evidence.

(2) ***For Issues Tried by Consent.*** When an issue not raised by the pleadings is tried by the parties' express or implied consent, it must be treated in all respects as if raised in the pleadings. A party may move – at any time, even after judgment – to amend the pleadings to conform them to the evidence and to raise an unpleaded issue. But failure to amend does not affect the result of the trial of that issue.

(c) Relation Back of Amendments.

(1) ***When an Amendment Relates Back.*** An amendment to a pleading relates back to the date of the original pleading when:

(A) the law that provides the applicable statute of limitations allows relation back;

(B) the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out – or attempted to be set out – in the original pleading; or

(C) the amendment changes the party or the naming of the party against whom a claim is asserted, if Rule 15(c)(1)(B) is

satisfied and if, within the period provided by Rule 4(m) for serving the summons and complaint, the party to be brought in by amendment:

(i) received such notice of the action that it will not be prejudiced in defending on the merits; and

(ii) knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity.

(2) ***Notice to the United States.*** When the United States or a United States officer or agency is added as a defendant by amendment, the notice requirements of Rule 15(c)(1)(C)(i) and (ii) are satisfied if, during the stated period, process was delivered or mailed to the United States attorney or the United States attorney's designee, to the Attorney General of the United States, or to the officer or agency.

(d) **Supplemental Pleadings.** On motion and reasonable notice, the court may, on just terms, permit a party to serve a supplemental pleading setting out any transaction, occurrence, or event that happened after the date of the pleading to be supplemented. The court may permit supplementation even though the original pleading is defective in stating a claim or defense. The court may order that the opposing party plead to the supplemental pleading within a specified time.

Federal Rule of Civil Procedure

Rule 23. Class Actions

(a) **Prerequisites.** One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

(1) the class is so numerous that joinder of all members is impracticable;

(2) there are questions of law or fact common to the class;

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

(4) the representative parties will fairly and adequately protect the interests of the class.

(b) **Types of Class Actions.** A class action may be maintained if Rule 23(a) is satisfied and if:

(1) prosecuting separate actions by or against individual class members would create a risk of:

(A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or

(B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or

impede their ability to protect their interests;

(2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or

(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:

(A) the class members' interests in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) the likely difficulties in managing a class action.

(c) Certification Order; Notice to Class Members; Judgment; Issues Classes; Subclasses.

(1) ***Certification Order.***

(A) *Time to Issue.* At an early practicable time after a person sues or is sued as a

class representative, the court must determine by order whether to certify the action as a class action.

(B) *Defining the Class; Appointing Class Counsel.* An order that certifies a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(g).

(C) *Altering or Amending the Order.* An order that grants or denies class certification may be altered or amended before final judgment.

(2) ***Notice.***

(A) *For (b)(1) or (b)(2) Classes.* For any class certified under Rule 23(b)(1) or (b)(2), the court may direct appropriate notice to the class.

(B) *For (b)(3) Classes.* For any class certified under Rule 23(b)(3), the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must clearly and concisely state in plain, easily understood language:

(i) the nature of the action;

(ii) the definition of the class certified;

(iii) the class claims, issues, or defenses;

(iv) that a class member may enter an appearance through an attorney if the member so desires;

(v) that the court will exclude from the class any member who requests exclusion;

(vi) the time and manner for requesting exclusion; and

(vii) the binding effect of a class judgment on members under Rule 23(c)(3).

(3) ***Judgment.*** Whether or not favorable to the class, the judgment in a class action must:

(A) for any class certified under Rule 23(b)(1) or (b)(2), include and describe those whom the court finds to be class members; and

(B) for any class certified under Rule 23(b)(3), include and specify or describe those to whom the Rule 23(c)(2) notice was directed, who have not requested exclusion, and whom the court finds to be class members.

(4) ***Particular Issues.*** When appropriate, an action may be brought or maintained as a class action with respect to particular issues.

(5) ***Subclasses.*** When appropriate, a class may be divided into subclasses that are each treated as a class under this rule.

(d) Conducting the Action.

(1) ***In General.*** In conducting an action under this rule, the court may issue orders that:

(A) determine the course of proceedings or prescribe measures to prevent undue repetition or complication in presenting evidence or argument;

(B) require – to protect class members and fairly conduct the action – giving appropriate notice to some or all class members of:

(i) any step in the action;

(ii) the proposed extent of the judgment; or

(iii) the members' opportunity to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or to otherwise come into the action;

(C) impose conditions on the representative parties or on intervenors;

(D) require that the pleadings be amended to eliminate allegations about representation of absent persons and that the action proceed accordingly; or

(E) deal with similar procedural matters.

(2) ***Combining and Amending Orders.*** An order under Rule 23(d)(1) may be altered or amended from time to time and may be combined with an order under Rule 16.

(e) **Settlement, Voluntary Dismissal, or Compromise.** The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

(1) The court must direct notice in a reasonable manner to all class members who would be bound by the proposal.

(2) If the proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate.

(3) The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.

(4) If the class action was previously certified under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

(5) Any class member may object to the proposal if it requires court approval under this subdivision (e); the objection may be withdrawn only with the court's approval.

[*Text of subdivision (f) effective until December 1, 2009, absent contrary Congressional action.*]

(f) **Appeals.** A court of appeals may permit an appeal from an order granting or denying

class-action certification under this rule if a petition for permission to appeal is filed with the circuit clerk within 10 days after the order is entered. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

[*Text of subdivision (f) effective December 1, 2009, absent contrary Congressional action.*]

(f) Appeals. A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule if a petition for permission to appeal is filed with the circuit clerk within 14 days after the order is entered. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

(g) Class Counsel.

(1) ***Appointing Class Counsel.*** Unless a statute provides otherwise, a court that certifies a class must appoint class counsel. In appointing class counsel, the court:

(A) must consider:

(i) the work counsel has done in identifying or investigating potential claims in the action;

(ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action;

(iii) counsel's knowledge of the applicable law; and

(iv) the resources that counsel will commit to representing the class;

(B) may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class;

(C) may order potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney's fees and nontaxable costs;

(D) may include in the appointing order provisions about the award of attorney's fees or nontaxable costs under Rule 23(h); and

(E) may make further orders in connection with the appointment.

(2) ***Standard for Appointing Class Counsel.*** When one applicant seeks appointment as class counsel, the court may appoint that applicant only if the applicant is adequate under Rule 23(g)(1) and (4). If more than one adequate applicant seeks appointment, the court must appoint the applicant best able to represent the interests of the class.

(3) ***Interim Counsel.*** The court may designate interim counsel to act on behalf of a putative class before determining whether to certify the action as a class action.

(4) ***Duty of Class Counsel.*** Class counsel must fairly and adequately represent the interests of the class.

(h) Attorney's Fees and Nontaxable Costs. In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement. The following procedures apply:

(1) A claim for an award must be made by motion under Rule 54(d)(2), subject to the provisions of this subdivision (h), at a time the court sets. Notice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner.

(2) A class member, or a party from whom payment is sought, may object to the motion.

(3) The court may hold a hearing and must find the facts and state its legal conclusions under Rule 52(a).

(4) The court may refer issues related to the amount of the award to a special master or a magistrate judge, as provided in Rule 54(d)(2)(D).

Louisiana Code of Civil Procedure article 595

West's Louisiana Statutes Annotated Currentness
Louisiana Code of Civil Procedure Acts 1960, No. 15 (Refs & Annos)
Book I. Courts, Actions, and Parties
Title II. Actions
View the full text of all sections at this level Chapter 5. Class And Derivative Actions (Refs & Annos)
View the full text of all sections at this level Section 1. Class Actions

Art. 595. Award of expenses of litigation; security for costs

A. The court may allow the representative parties their reasonable expenses of litigation, including attorney's fees, when as a result of the class action a fund is made available, or a recovery or compromise is had which is beneficial, to the class.

B. The court, on contradictory motion at any stage of the proceeding in the trial court prior to judgment, may require the plaintiff in a class action to furnish security for the court costs which a defendant may be compelled to pay. This security for costs may be increased or decreased by the court, on contradictory motion of any interested party, on a showing that the security furnished has become inadequate or excessive.

WEST'S LOUISIANA STATUTES ANNOTATED
LOUISIANA CODE OF CIVIL PROCEDURE
BOOK I. COURTS, ACTIONS, AND PARTIES
TITLE II. ACTIONS
CHAPTER 5. CLASS AND DERIVATIVE ACTIONS
SECTION 1. CLASS ACTIONS

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LOUISIANA STATUTES ANNOTATED

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CODE OF CIVIL PROCEDURE
BOOK I. COURTS, ACTIONS, AND PARTIES
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CHAPTER 5. CLASS AND SECONDARY ACTIONS
SECTION I. CLASS ACTIONS

Art. 595. Award of expenses of litigation; security for costs

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The court, on contradictory motion at any stage of the proceeding in the trial court prior to judgment, may require the plaintiff in a class action to furnish security for the court costs which a defendant may be compelled to pay. This security for costs may be increased or decreased by the court, on contradictory motion of any interested party, on a showing that the security furnished has become inadequate or excessive.

Louisiana Code of Civil Procedure article 421
West's Louisiana Statutes Annotated Currentness
Louisiana Code of Civil Procedure Acts 1960, No. 15 (Refs & Annos)
Book I. Courts, Actions, and Parties
Title II. Actions
Chapter 1. General Dispositions (Refs & Annos)

Art. 421. Civil action; commencement; amicable demand unnecessary

A civil action is a demand for the enforcement of a legal right. It is commenced by the filing of a pleading presenting the demand to a court of competent jurisdiction. Amicable demand is not a condition precedent to a civil action, unless specifically required by law.